TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 313

BERT SMITH, PETITIONER,

vs.

J. TURNER BUTLER, ET AL., TRUSTEES.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITION FOR CERTIORARI FILED AUGUST 10, 1960
CERTIORARI GRANTED OCTOBER 24, 1960

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[fol. 1] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

AT LAW.

No. 38384

Judge Pearson—L

BERT SMITH, Plaintiff,

vs.

JOHN W. MARTIN, as Trustee of the property of the FLORIDA EAST COAST RAILWAY CO., a corporation, Defendant.

COMPLAINT—Filed March 7, 1957

The plaintiff, Bert Smith, sues the defendant, John W. Martin, as Trustee of the property of the Florida East Coast Railway Co., a corporation, and avers:

1. That this is a civil action arising under Section 51-60 of Title 45 U.S.C.

2. That the defendant, John W. Martin, operates the Florida East Coast Railway Co. as a common carrier railroad system by virtue of his appointment as Trustee.

3. That at all times material to this action the plaintiff was and is an employee of the defendant, John W. Martin, as Trustee of the property of the Florida East Coast Railway Co., a common carrier railroad engaged in interstate commerce; that the plaintiff was working at his regular employment.

4. That on or about September 13, 1956, at or about 8:00 a.m., the plaintiff was employed as a trainman by the defendant in Miami, Dade County, Florida; that while in the exercise of his duties and at the direction of the defendant's agents and supervisors, the plaintiff was required to participate in a "field test" along the defendant's right [fol. 2] of way and tracks, owned and operated by the

defendant, at a point north of North Miami, Florida, just south of the People's Gas Company gas tanks; that while engaged in said "field test" the plaintiff received serious and grievous personal injuries and damages as hereinafter alleged.

5. That on September 13, 1956, the defendant was negligent in the following acts of omissions and commissions:

(a) In negligently and unlawfully requiring the plaintiff to participate in such a "field test";

(b) In negligently allowing its servants, agents or supervisors to conduct such a "field test";

(c) In negligently furnishing the plaintiff a dangerous and unsafe location at or upon which to engage in such a "field test";

(d) In negligently furnishing to plaintiff a dangerous and unsafe place at or upon which to work;

(e) In failing to use ordinary care in providing the plaintiff a reasonably safe place to work;

(f) In failing to provide the pla[redacted] a reasonably safe place to work;

(g) In negligently failing to provide the plaintiff with proper equipment and safeguards in performance of his duties and in the participation in such a "field test";

(h) In failing to provide adequate supervision and instructions governing the conduct of said "field test".

6. That as a direct and proximate result of the aforesaid negligence, the plaintiff was caused to be seriously and permanently injured in and about his hands, head, arms, legs, body and nervous system; and among his said injuries he sustained a severe injury to his left knee, his left hip and back, and other injuries not yet diagnosed; that an advanced osteo-arthritic condition was caused to exist or a previously existing osteo-arthritic condition [fol. 3] was aggravated or caused to flare up; that all of

the aforesaid injuries are permanent and continuing in their nature.

7. That as a further direct and proximate result of the foregoing, the plaintiff has in the past and will in the future suffer or incur the following damages: loss of earnings and overall diminishment of his earning capacity; liability for doctors' hire, hospital, x-rays and related medical expenses; great mental and physical pain and suffering; physical handicap and disability; disfigurement, embarrassment, anguish, humiliation and emotional instability; and he has been rendered less able to attend his work and employment and to lead a normal life.

Wherefore, the plaintiff sues the defendant for damages and demands judgment in an amount within the jurisdictional limits of this Court, to-wit: more than Five Thousand ($5,000.00) Dollars, exclusive of costs, and demands trial by jury of all issues triable as of right by a jury.

Dated: March 7, 1957.

Nichols, Gaither, Green, Frates & Beckham, By Peter T. Fay, Attorneys for Plaintiff, 448 Pan American Bank Building, Miami 32, Florida.

[fol. 4] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
AT LAW
No. 38384

[Title omitted]

ANSWER—Filed March 29, 1957

For Answer to Complaint, defendant says:

First Defense

1. He denies the allegations of Paragraph 1.

2. He admits the allegations of Paragraph 2.

3. He denies the allegations of Paragraph 3.

4. He admits that plaintiff was required to take a field test along defendant's right-of-way but denies the remaining allegations of Paragraph 4.

5. He denies the allegations of Paragraphs 5, 6 and 7.

Second Defense

The plaintiff was guilty of negligence which caused or contributed to the injuries complained of.

Scott McCarthy Preston Steel & Gilleland, By Dwight Sullivan, Attorneys for Defendant, 627 Ingraham Building, Miami, Florida.

Certificate of Service (omitted in printing).

[fol. 5] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

AT LAW

No. 38384-L

BERT SMITH, Plaintiff,

v.

JOHN W. MARTIN, as Trustee of the property of FLORIDA EAST COAST RAILWAY COMPANY, Defendant.

Transcript of Trial—Thursday, July 25, 1957

Miami, Florida

The above-entitled case came on for trial before the Hon. Ray H. Pearson, Judge of the above-styled court, and a jury, at the Courthouse, Miami, Florida, on Thursday, July 25, 1957, at 2 o'clock p.m., pursuant to notice.

APPEARANCES:

William S. Frates, Esq., of the firm of Nichols, Gaither, Green, Frates & Beckham, on behalf of the Plaintiff.

Dwight Sullivan, Esq., of the firm of Scott, McCarthy, Preston, Steel & Gilleland, on behalf of the Defendant.

[fol. 7] The Court: Mr. Clerk, call the first six jurors.

(Thereupon the jurors were called, examined on their voir dire, and sworn to try the case.)

Mr. Sullivan: I'd like to ask your Honor to invoke the Rule.

The Court: All right.

(Thereupon the witnesses were sworn.)

The Court: Sir, the Court has invoked the Rule on a motion before the Court. Under the Rule you will remain outside the presence and immediate hearing of the Court until you are called in to testify in the trial.

You will not discuss the case with any other witnesses or with any other persons or parties while the trial is proceeding. The only exception to that Rule is to the respective attorneys who have the right to talk to you outside the presence of any other persons or parties, and outside the hearing of them. Will you step outside and wait until we call you, sir, or you are excused?

(Thereupon the witnesses retired from the courtroom.)

The Court: Let us go ahead with our opening statements, gentlemen.

OPENING STATEMENT ON BEHALF OF PLAINTIFF

Mr. Frates: Gentlemen of the jury, I'm just going to take a few minutes to make what is known as an opening statement. In other words, give you some idea of the jigsaw [fol. 8] puzzle as we put it together, so that as each witness takes the stand you have some idea of what we expect the evidence to show in this case.

Of course, what I say at this stage, or what the lawyers say throughout this trial, is not the evidence in this case.

We're here merely to assist you folks in trying to determine the issues in the case, and the truth of the matter. That's why we have this opportunity to point out or give you the highlights of what the various witnesses would say.

Bert Smith, the plaintiff in this case, is 62 years of age. He's worked for the Florida East Coast Railroad since 1920. He is high—or at the time of his injury back in September of '56 he was one of the top men on their seniority list as a flagman and as a baggageman.

Railroad men have different categories that they can be in, and I think a conductor is a good illustration. You have some trainmen that are on a conductor seniority list and then they qualify; they get on a conductor's list, and they can be on two or three lists.

Bert Smith happened to be on the baggageman list, high in seniority there and high in seniority on the trainman's list. Of course, they change jobs, as you know. They don't have one particular train and one particular job. But by virtue of his seniority he had a job back in September of 1956 that's known as a flagman's. And he's the fellow who [fol. 9] rides on the rear end of the train and puts out these fusees and things of that nature and protects the rear of the train. That's generally his duty.

Now, Bert Smith has never been called slim, nor he's never been a sprinter. He's been a heavy fellow who's had some difficulty in walking, as you say in relation to somebody who can run down the tracks. But for years he has done his job as a flagman for the railroad, and he has done it well.

The Florida East Coast has a medical department. They have a chief surgeon and they have doctors here in Miami. They have a hospital, and which is part of the system, although, as it will be brought out, the men themselves make a payment to that hospital for which they receive services.

The man in charge of the hospital is also the chief surgeon, a fellow named Dr. Lockwood. The railroad has a system whereby they have either periodic examinations by the medical department, or when there's any question about any man's ability to work he is examined by either a man here—they have a large staff of doctors here.

They don't spend all their time doing Florida East Coast work, but they're on their staff. And Dr. Lockwood, the chief surgeon of the Florida East Coast, has a slip of paper in which he authorizes or gives his medical opinion that this man is able to return to work.

Now, a short time before this accident occurred—and all [fol. 10] of these facts will be brought out, and I'm not going into details because it would take too long. Bert Smith had been having trouble with his legs; Bert Smith had been having trouble with his legs for years. He has what all of us get as we grow older—arthritis. This particular arthritis is osteo-arthritis, and they had been treating him, and he had been up to St. Augustine before this accident, and he was in the hospital there being treated for it and Dr. Lockwood, the chief surgeon of the railroad, gave him a slip of paper and told him to report back here to work. And he did.

He was doing his job just like he had been doing his job for years before, and Bert Smith is the kind of fellow who happens to know every rule that was ever written for the railroad. He's proud of himself on knowing the rules and the regulations, and he's had some conflict with the management because he did know the rules and regulations and he was not the kind of fellow that anybody could push around, because he could quote the rules to them verbatim—had a phenomenal memory as far as the rules are concerned.

So the trainmaster, Mr. Clark here, all of a sudden decides one day after the doctor—the medical department—had told him that he could work, that he's going to give him some kind of test. And he went to him and he says, "Either you retire or we're going to give you a test." They didn't send him to a doctor, although they have them here, [fol. 11] and that's the proper procedure that they should follow.

They said, "We're going to give you a test." He could have taken him out of the service at any time that he wanted to and sent him to a doctor for a physical examination if he thought he couldn't do the job. But he didn't see fit to do that. He didn't see fit to take him off of that job and put him back as a baggageman. He and Hamilton,

who is the superintendent—and I don't know whether he'll be here to testify—of their own volition, decided they're going to take Bert Smith up here north of Miami and run what they call a field test. They're going to make him walk a mile down the track, without consulting a doctor—without any reason in the world, although they say, "Well, we're going to see if he can do this."

The Florida East Coast has had a long-standing rule that the doctors—and, of course, that makes sense—are the ones to determine whether a man can do his job. And he had been doing his job and been returned to work by their chief surgeon. But these trainmen decide they're going to make a test, and so they get out here on a hot day and have him try to walk a mile down the track.

In that track, in violation of their common-law duty and the regulations of the Public Utility Commission which govern railroads in this State, they had weeds, and Bert Smith had trouble getting down that mile. He got about [fol. 12] 3,000 feet, and walking in between tracks with slag and things of that nature is not easy for anybody to do, under the best circumstances. There was some wire and weeds there and he tripped over it, and he fell down and injured his knee.

They rushed him to the doctor, and at that time it looked rather serious as far as his general health was concerned, because he had had high blood pressure for years. But they knew all of these things and he was still doing the job to their satisfaction, and to the medical department's satisfaction.

Now, this test they gave him—there is no rule, no regulation of the railroad. This test had never been given to anybody else in the history of the railroad, and this was a little scheme that these fellows cooked up to get rid of Bert Smith, without any right to do it and contrary to the procedure that had been followed for years on the railroad. And they just arbitrarily did that.

The general chairman of the union protested and gave them a written protest, and told them that " . . . This is not a procedure that you could do . . . " But they ordered him to do it and he had to do it.

Now, as a result of his fall they rushed him to the doctor and he was hospitalized for a while, and as a result of his fall we come to what injuries did he sustain? He had this arthritis in his knees, and as I said before—and the [fol. 13] doctors will testify—arthritis is something that we get as we get older, but a blow or trauma as they call it, to arthritis, can aggravate it or make it worse.

The fall didn't cause the arthritis, and incidentally, these men knew that he had this problem, and he fell and we'll show you by the evidence of the doctor, the railroad's doctor here in this area, that this fall which was due to their negligence, which was due to their carelessness and which they had no business doing—caused this arthritis in his knee to flare up, and today he is totally unable to work.

The doctors will testify that this fall, this blow to his knee, caused him to become totally disabled for a period of years before he would have become disabled. And I think the medical evidence will show that ultimately, sometime in Bert Smith's life, he probably would have had to stop working, but that this fall from this unauthorized test—this test that no one else had ever been given, that was in conflict with the medical department, that is what I call a spite test—was given to him and as a result of that, he was unable to work and is unable to work on the railroad, and there will be no conflict about that.

You gentlemen are going to have to determine under the medical testimony, for how long a period of time was Bert Smith cut out of the right to work and earn the money that he could have earned as a flagman by virtue of his [fol. 14] long service on the railroad, and seniority? His salary was a pretty good salary. His run was from Miami to Ft. Pierce.

Now, that's in essence, the lawsuit as we see it, and I don't think there's going to be any conflict in the facts that I have told you. I think after you've heard all of the evidence from the witness stand—and we're going to prove a lot of this by the railroad executives themselves, including Mr. Clark sitting right here, as the railroad representative—that we're going to show this, and we think

that under the facts in this case that he would be entitled to a verdict. The amount, of course, will have to be determined by you, for the injury that they caused him in running the test and not giving him a safe place to perform the test.

After we hear the evidence, when I come back and Mr. Sullivan comes back, we have an opportunity to sum up. I'm going to ask you then, as I point out to you now, to bear in mind everything that I have told you and see if everything that I haven't told you is borne out by the evidence in this case, and if it is, Bert Smith is entitled to a verdict. Thank you.

Opening Statement on Behalf of Defendant

Mr. Sullivan: Your Honor; gentlemen; as Mr. Frates said, what we say on opening statements, any law we quote to you, what we say, isn't evidence. If there is any inconsistency with what we say the law is and Judge Pearson says it is, you are to be guided by what Judge Pearson says.

On this, what's the claim all about? Bert Smith is suing [fol. 15] a trustee of the railroad. He's claiming in effect—not he, but the trustee—was negligent; that the trustee or his agents or representatives were negligent in various particulars. He says, in giving Bert Smith a field test; providing the field test in a place where it wasn't safe for Bert Smith to walk; in choosing the area where it was; in choosing the time and place where the field test was given, and all the particulars surrounding it.

The evidence will show that Bert Smith has been employed by the railroad as a trainman for a good many years. A trainman—all of the jobs on the railroad depend on seniority, that is, the longer you've been there the more choice you have as to jobs, the more desirable job. Naturally, some jobs are considered more desirable than others. The longer you've been there, the more desirable job you're eligible for.

Bert Smith had worked as a trainman, which means on passenger trains and on freight trains. In latter years he had worked mainly on passenger trains. He'd worked mainly as a flagman.

The evidence will show that on a passenger train you have two trainmen. You have someone called the baggage master who works up front of the train, and you have a flagman who works toward the rear of the train. Of the two, the flagman's job is considered by trainmen on the railroad an easier job, because when the train is in motion [fol. 16] there isn't a great deal a flagman has to do. He checks the rear of the train from time to time. If there's an emergency he may throw over a lighted fusee or candles or what-have-you, over the rear of the train.

But his main job comes if and when there's an emergency. The main thing he's on the train for is if there's some kind of an emergency, it's his job to prevent a train coming up from behind and running into the train in front that's stopped for any reason at all.

Now, there will be evidence about the block signal system. The block signal system isn't the crossing protection you may see at some of the crossings, the lights and gates. The block signal system is a system installed along the railroad for the operation of train crews. And it's set up electrically and it gives green and yellow and red signals to indicate to an engineer whether or not he is moving up on the train ahead of him.

Primarily, the engineers depend on these block signal systems, but the flagman is there in the event something might go wrong with one of them. He's there in case of an emergency.

Now, the evidence will show that if and when there is an emergency, it's the flagman's job to, either on his own initiative if he thinks it's necessary, or if the engineer or conductor tell him to, to go on back a sufficient distance— [fol. 17] and you'll hear the phrase, "to protect the rear of the train." I think the evidence will show that almost invariably, the sufficient distance is to go behind the block signal to the rear of you just to make sure that that signal is operating. If that signal is operating it shows red, and an engineer coming up from the train, behind, knows there's a train ahead of him.

But you're concerned with an emergency, and you have to go back at least that far to make sure the train ahead

of you is protected—not only your fellow-employees, but the passengers on it. Now, those block signals are approximately a mile apart all the way down the line, so in going back, the chances are that the distance you will have to go is a mile or a little more. You go behind the signal, and far enough down so that you are in a position to flag an oncoming train. That's what a flagman's job is.

I'd like to mention something about a baggage master, too. The evidence will also show that a baggageman has to wrestle the baggage. When a train stops at a station he has to load it off and on. He's there in an emergency capacity. If there's a possibility of a train approaching head-on, it's his business to go down and flag the front of the train.

Now, the evidence will show that Bert Smith had worked primarily as a flagman. It's a big job, and under the [fol. 18] various contracts in effect with the union brotherhoods, he can choose. The more seniority, the greater choice of jobs he has, and where he wants to work.

The evidence will show that Bert Smith is a man five feet six or five feet seven; that for many years he has been a heavy man; he has been probably overweight; at various times his weight has been as high as 300 pounds. In addition to that, as the years went by Bert Smith developed arthritis. It settled mainly in his knees, and the fact that he was overweight contributed to the more rapid advance of it than you'd find in some other people.

That in early 1956 Bert Smith's arthritis in his knee had advanced to the point where he went to doctors here in Miami and was treated for it. It bothered him to the extent it was hard for him to move, to carry the weight of a man his size, and he was treated by heat treatments, injections and the like.

The evidence will show it got to the point where Bert Smith went to the hospital in St. Augustine. The hospital is a hospital called the East Coast Hospital Association, and is financed primarily by contributions of railroad employees. The railroad also makes contributions to it. He was up there for several months being treated for arthritis, primarily in his left knee, and also for the overweight problem that he had for many years. He came back from

the hospital, out of the hospital and returned to work sometime in August of last year.

[fol. 19] The evidence will also show that Mr. Clark here, who is the trainmaster, has the job of primarily supervision of conductors and trainmen. It's his job to see that there are enough people working there that are adequately trained, that they're capable of doing the work.

Now, that sums up in very broad terms, what his job is. Now, Mr. Clark noticed Bert Smith, saw that he was having increasing difficulty in getting around. So pursuant to his general directions, he wrote to the superintendent. There are several trainmasters on the railroad. The superintendent is in charge of all of them.

He wrote to the superintendent about Bert Smith, and said, "I know that he's having difficulty in getting around. He was instructed to suggest to Bert Smith (1) the question of his retiring because of his difficulty in moving and in performing his job, or (2) if he didn't feel that he was disabled, of going ahead and taking a field test.

Now, the field test that was given to him was exactly and precisely the thing that he was supposed to do, that he was there on the train for. He was asked to start at one mile post and walk to another mile post. Now, prior to the time the test was given, Bert Smith was given a notice of the test and also instructed in the notice—there was a paragraph to the effect that, "You may have a representative of your choice with you. You can have some-

[fol. 20] one there representing you when this test is given."

The evidence will show that either just before or just after Bert Smith received this notice, he went up to St. Augustine and at least represented to Mr. Clark on the day this test was given, he saw the doctor and the doctor told him he was all right. On that basis Mr. Clark said, "If you feel you're all right let's take the test."

They chose an area up in North Miami, and the particular mile they chose was one where there was one street crossing, and they chose it so there wouldn't be many grade crossings in there; you wouldn't have the problem of vehicular traffic. Evidence will show that there were six people there at various times. There was Mr. Clark; there was a Mr. Johnson, who is a road foreman of engines,

who has a comparable job to Mr. Clark's. He's in charge of engineers and firemen. There was also a Mr. Bader, the special agent; there was a Mr. Delk, who is the general chairman of one of the railroad brotherhoods, and Mr. Baumberger, who was chairman of the other brotherhood.

Bert Smith belongs to two unions. They started from one mile post, and the evidence will show that as they started off they pulled out watches and compared watches to see how long it was going to take to walk this mile; that Mr. Clark and Mr. Johnson went on ahead; that either Bert Smith and the other two men started out together, [fol. 21] or they started out ahead of him. At any rate, they left him along the way and he was bringing up the rear. He was going the slowest of all of them.

The evidence will show that this right of way—I'm not going to tell you in September that there were not weeds or some grass on the right of way; there was no better, no worse. It was an average right of way. He was being asked to do on that test, precisely what his job called for. Field tests had been given to other employees, the evidence will show, in line with what their particular jobs called for. A field test, as such, was nothing new.

Naturally, the test will vary a little bit from employee to employee, depending on what his work called for; that Bert Smith simply because of his knee, or because he tripped or because he was a heavy man, was unable to walk this mile; that he fell down in an area where Bert Smith said there were gopherberry bushes, and he claims he tripped on a gopherberry bush at one point, and he claims he tripped on a wire in another point.

He was the only one who fell, the only one who tripped. He was the only one who stumbled at all during the entire mile, the evidence will show. We're going to show you pictures of the particular area; we're going to show you pictures of other areas on the railroad right of way in connection, to show you how it compared with other miles [fol. 22] or mile posts all up and down the line from Miami to Jacksonville.

I think the evidence will show when it's all in, gentlemen, that not only did Mr. Clark have a right, but he had a duty

in his duties as trainmaster, to call to the attention of his superiors the fact that he noted one of the men he was responsible for, wasn't able to do the work required of him; that he would have a duty not only to fellow-employees, but to passengers, to general operation of the train, and they asked him to do nothing that he wouldn't have had to do, anyway, in the general line of what the job called for.

In terms of the injury to Bert Smith, I think the evidence will show that he went to a doctor. The main complaint he had was his left knee, the left knee that had bothered him before. We're not contending that there wasn't some injury superimposed on what he had before, but I think the evidence will show that what he had was progressive; there's no cure for it. It's something that gets steadily worse as you get older. It was advancing more rapidly in Bert Smith because of his size and his weight.

The evidence will show that while there may have been an aggravation to this knee injury, that the general course of his—I won't say let's call it a disease or an injury. I don't know exactly how you'd term it, but this arthritis is something that is getting worse and getting worse, progressively, and more rapidly just before this happened; and that [fol. 23] the results of his particular fall he had, if they haven't worn off completely they're just about worn off, and what Mr. Bert Smith is suffering from today is exactly what he was suffering from six months and a year and two years before this ever happened. Thank you.

Mr. Frates: Your Honor, at this time we'd like to call Mr. Clark under Rule 37, since he's here as the representative of the railroad.

Mr. Sullivan: Your Honor, on that, I'd like to be heard under the circumstances as to whether or not—

The Court: Do you want me to excuse the jury?

Mr. Sullivan: Yes, your Honor.

The Court: Excuse the jury, please.

(Thereupon the jury retired from the courtroom and the following proceedings were had:)

Mr. Sullivan: Your Honor, as to Mr. Frates calling Mr. Clark as an adverse witness, which I understand he intends to do, we take the position that Mr. Clark is not

an officer; he's not a director; he's not a managing agent of the defendant; that he is one of the officers of the FEC, but he is not a managing—he's not one of the top officers. He's not a managing agent and he takes his instructions from the superintendent and, therefore, he doesn't fall within the Rule.

Mr. Frates: Your Honor, the Supreme Court has ruled directly on this point on a case that came out about six [fol. 24] months ago, and I'm sorry I don't have the citation. But in the Ford case which I tried, they discussed Rule 37, and in that particular case they said the claims investigator was not the managing agent. And a week later from that, they came out where a fellow normally wouldn't be the managing agent, and they said by virtue of the fact that he was in attendance at the Court as the representative of the defendant, then he was subject to being called under Rule 37.

Clark in this case—I think he'd be qualified to be called under Rule 37, even if he were not their representative here, because he is the trainmaster in charge of this entire area. But I think the fact that he is here, sitting here as the representative, makes that a moot question.

Mr. Sullivan: Your Honor, as to that particular aspect of the Ford case, I'm not familiar with it.

Mr. Frates: That wasn't in the Ford case. That was a subsequent case. They didn't say in that particular case.

Mr. Sullivan: I remember the two dermatitis cases, and they severely limited that rule as to various defendants, your Honor. It used to be you could call practically anybody and claim he was adverse, and do anything you wanted. I think they're taking a rather strict interpretation of that rule.

Mr. Frates: I'm sorry I don't have that citation, but I assure your Honor that's what they ruled, that as a representative he's entitled to be called.

[fol. 25] The Court: I will note in the record the exception to the calling of this witness as an adverse witness, but in the Court's interpretation of the Rule I will permit him to be called, and note your exception to it.

Bring the jury back in, Mr. Bailiff.

(Thereupon the jury returned to the courtroom, and the following proceedings were had:)

Thereupon—

C. T. CLARK was called as a witness by the Plaintiff, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Frates:

Q. Will you state your name?
A. C. T. Clark.
Q. Mr. Clark, what is your position with the Florida East Coast Railroad?
A. Trainmaster.
Q. And will you tell the jury what a trainmaster is and what your duties are?
A. Well, we have the responsibility of the operation of the trains and the personnel that operate the trains.
Q. Where is your district or the area that you operate?
A. From 79th Street to Ft. Pierce, and from Ft. Pierce [fol. 26] to Lake Harbor.
Q. Lake Harbor is out towards Lake Okeechobee. Is that right?
A. That's right. It's on the southeastern corner of Lake Okeechobee.
Q. Are you in charge of the flagmen?
A. Yes, I am.
Q. Are you in charge of all the people who operate the train, is that right?
A. That is right.
Q. Now, who is your immediate superior in the Florida East Coast?
A. Mr. I. E. Hamilton is superintendent.
Q. And he's the general superintendent?
A. Yes, he is.
Q. In other words, as far as operations are concerned,

he's the No. 1 man and you're in a district—you're in charge of operations; would that be correct?

A. Well, Mr. Hamilton is the superintendent. He's not the general superintendent. We don't have a general superintendent, but he has overall jurisdiction of the trainmasters.

Q. Of the trainmasters of the entire railroad?

A. Yes.

Q. Now, how long have you been trainmaster?

A. I think I was appointed in 1951 in October, and for six [fol. 27] years worked as a trainmaster for about seven months out of the year, and for the past year or 13 months I've been in Miami.

Q. When you weren't a trainmaster what was your duty with the railroad?

A. Conductor and trainman.

Q. Conductor and trainman?

A. That's correct.

Q. Now, how long have you worked on the Florida East Coast?

A. A little over 15 years.

Q. About 15 years?

A. A little over that, yes.

Q. Now, will you tell the jury whether or not the Florida East Coast from Miami to Ft. Pierce—and, incidentally, that was the area that Bert Smith worked; is that correct?

A. That's correct.

Q. From Miami to Ft. Pierce, and then back?

A. That's correct.

Q. Will you tell the jury about the type of track that you have from Miami to Ft. Pierce?

A. I presume you mean steel rails. It's mounted on crossties with rock ballast.

Q. Do you have a single track or double track?

A. We operate a double track.

[fol. 28] Q. In other words, your northbound trains on one track; the southbound on another. Right?

A. That's correct.

Q. What type of signal system do you have in that area? We're just going to confine ourselves from Miami to Ft. Pierce.

A. Automatic block system.

Q. And what is an automatic block system?

A. Well, it's an electrical device that indicates by lights, which there's three lights on a mast—they indicate green for proceed; yellow for caution; and red for stop. And they're located approximately a mile apart and—do you want me to explain a little further?

Q. Yes, go ahead.

A. In the event that there was a train in the preceding block, then the block—the following train would run up against would be red.

Q. In other words, every mile you have an automatic electrical system.

A. Approximately every mile.

Q. Approximately every mile, with what we call a stop and go light. Is that what it is?

A. That's right, the same as your street light.

Q. Now, if a train stops on the northbound track what happens to the light back of it?

[fol. 29] A. Well, the first light to the rear of him would be red, and the one before that would be yellow.

Q. In other words, in the next mile the light would be red?

A. That's correct.

Q. For any train approaching here. In other words, it would be back at least a mile, wouldn't it?

A. That's correct.

Q. Let's say, that block system is a system that's elevated up so the engineer and fireman can see it; is that correct?

A. That's correct.

Q. Let's say these are the block signals in an upright position. If a train stopped up here (Indicating) in this block, this one would indicate red; would it not?

A. No, that—yes, that would indicate red, and the other one, yellow.

Q. But this particular one would indicate yellow and it would have to be at least a mile?

A. Well, I don't believe I quite follow you there.

Q. These are the block systems.

A. Yes.

Q. If a train is stopped up here, they are about a mile apart?

A. Yes.

[fol. 30] Q. This one would be red, wouldn't it?

A. That's right, proceeding.

Q. How does that work when a train stops? Do you know how the block system operates?

A. Well, they're circuits, but if that's what you mean—

Q. Yes.

A. They're circuits mounted on the rail.

Q. Now, back to the other block system, which would be two miles back, it would turn yellow or caution?

A. That's right.

Q. Now, that obviously, is for the train approaching on that track. Right?

A. That's correct.

Q. Now, the flagman operates in the rear of the train.

A. Yes.

Q. And when the train stops he's supposed to get off, and what type of equipment does he have?

A. Well, he has a signal case with fusees and torpedoes.

Q. And what is a torpedo, Mr. Clark?

A. Well, a torpedo is a disk that's placed on the rail that when a train runs over it, it explodes.

Q. And causes an explosion; is that right?

[fol. 31] A. Yes; a minor explosion.

Q. Now, what is a fusee?

A. A fusee is a flare that, by striking it manually, it burns, or as on this road, it burns ten minutes.

Q. What do you do—take it and hit it against the rail?

A. No, they have a cap that you take the cap off and the top of the cap is very similar to your matchbox, and you scrape it against the cap on the fusee.

Q. And then it has a spike in it, does it not?

A. That's right.

Q. Now, what happens, then? You ignite that?

A. Well—

Q. What comes out of the fusee?

A. Well, it's phosphorus, I think.

Q. What color smoke?

A. Well, it would be a sulphur smoke.

Q. Isn't it a blue smoke, Mr. Clark?

A. Well, yes.

Q. Have you seen one recently, in the last several years, operate?

A. About 15 minutes ago, before I come up here.

Q. About 15 minutes ago?

A. Yes.

Q. You saw the blue smoke, then, didn't you?

[fol. 32] A. There's a blue tint to it. I wouldn't call it blue. There's a blue tint.

Q. And it just goes on up and is very visible. Right?

A. That's right.

Q. And that will go for ten minutes?

A. Approximately ten minutes.

Q. And the flagman has that, and that's what he does. He puts that on the rear of the train so the engineer and flagman of any approaching train can see it. That's an additional feature in addition to the block system.

A. That's correct.

Q. And, of course, your block system is meticulously maintained all of the time, isn't it? You have a special department?

A. That's right.

Q. Seeing that the block system works all the time?

A. However, we do have block failures of cases where the blocks are not operating, you know. A light bulb burns out or other weather conditions, or something like that.

Q. Do you mean that you have occasions when your blocks don't work on the Florida East Coast?

A. Yes, sir. Our light bulbs burn out most every day.

Q. Every day?

[fol. 33] A. Most every day.

Q. Every day the block system doesn't work?

A. No, sir; I didn't say that. I say the light bulbs can burn out every day.

Q. Then you'd have to have two of them, though. You'd have to have the red and the caution burn out, wouldn't you, to have a complete breakdown?

A. Well, no. A dark light—one dark indication on this mast gives a signal to reduce the speed. It's a restricted signal.

Q. So even if you have a couple lights burn out, it still operates?

A. Yes, but not a correct indication all the time.

Q. But your engineers know about it. In other words, this is about as foolproof as you can get a signal system, isn't it?

A. Well, it's one of the most modern, yes.

Q. Now, on a straight track—incidentally, why did you run this experiment on the fusee? You hadn't seen one in quite some time?

A. No, I see them every day. I always keep some in my car.

Q. Why?

A. Well, as a matter of principle, I have for years carried them in my car.

[fol. 34] Q. How high did that smoke go up? Did you hold it up like that? (Indicating.)

A. I didn't pay no attention to it. That would depend on the weather conditions and everything else, on how high the smoke would go.

Q. An engineer and fireman are trained to look out for those fusees in addition to the block system?

A. Certainly.

Q. On a straight track and a clear day without much wind, how far can you see this smoke?

A. I'd be hesitant to say because—

Q. A long way, wouldn't it?

A. Well, I wouldn't say. It depends on what you call a long way, because if it was a very clear day and a hot day, you wouldn't see the smoke near as far as if it was foggy.

Q. I'm asking you on a clear day, approximately how far away would you see the smoke if you are in the engineer's cab? Did you ever make a test?

A. No.

Q. It goes on up and throws out a lot of smoke, wouldn't it?

A. What do you call a lot?

Q. Tell me how big is the base of the smoke it throws out.

A. Of course, the base is about an inch, right at the [fol. 35] base.

Q. How far does it go up? If you will take your hands and show us—

A. It flares out. It would be hard to say how high it goes, because—

Q. You just looked at one, didn't you, just a few minutes ago?

A. Yes, I looked at one this afternoon.

Q. Can you tell us when the smoke is up this high (Indicating) how wide it is?

A. Well—

Q. Approximately. I know you didn't get out there and measure it, but you've seen them.

A. Sure, I've seen them. I don't know—they start at the base and then it depends—they branch out as they go higher, until finally if they get a few feet high, it's spread so much then that you don't notice any smoke so much.

Q. How high does it get before you don't notice any smoke?

A. I couldn't tell you in feet how high it gets, but I don't—

Q. What did you do with this one that you just tested? How high did it get?

A. I never looked, never paid any attention to it. To determine that, I'd have to have been away from it. The rea- [fol. 36] son I struck it is that I've had them in my car so long, and I wanted to see if they were still good or not. It wasn't a matter of making a test.

Q. Was this one good?

A. Yes, it was.

Q. How long did you let it burn?

A. Oh, maybe two minutes; maybe a minute. I just struck it to see whether the rest of them would be any good, and knocked it out on the rail.

Q. It's a bluish tint smoke?

A. That's right.

Q. How high did that go during the two minutes you were there?

A. I haven't any idea. I wasn't paying any attention to the smoke.

Q. Did it go above your head?

A. I still don't know, because—

Q. When did you perform this test?

A. This afternoon.

Q. And you can't tell this jury how high it went?

A. No, I can't, because I wasn't observing.

Q. And you're the trainmaster, the man in charge of the entire operations of the Florida East Coast from Miami to Ft. Pierce?

A. I wouldn't say the entire operation—just the operat-

[fol. 37] ing department.

Q. The operating part. Mr. Clark, does the Florida East Coast have a medical department?

A. Yes; The East Coast Hospital Association, I think is run by—

Q. Is Dr. Vernon Lockwood the chief surgeon of the Florida East Coast Hospital?

A. He is.

Q. When a man is off sick or injured, does he get a slip from the medical department that he's able to work, return to work?

A. Yes, he gets a release from the doctor.

Q. And doesn't that release indicate that he is fit for duty?

A. Well, he might be fit for duty in the doctor's—

Q. Would you answer my question, sir, yes or no, whether that paper indicates from the doctor's viewpoint he is fit for duty, and then you may explain if you wish.

Mr. Sullivan: Just a moment—

The Court: I will permit the witness to answer it if he can; then explain it in your own words.

The Witness: Yes, that is the opinion of the medical department, that he has recovered sufficiently to go to work. Now, however, the doctors do not have the facilities nor the equipment to actually test a man to see whether—and

[fol. 38] they're not familiar enough with the duties of each employee to know whether or not he could actually perform the duty in which service he is employed.

By Mr. Frates:

Q. How long has Dr. Lockwood been the chief surgeon of the Florida East Coast Railroad?

A. I do not know, but he's been here for many years.

Q. And is it your testimony that Dr. Lockwood is not aware of the duties of the various men on the railroad?

A. I hardly think that Dr. Lockwood would be as familiar

with the duties of a flagman as I am, or of an engineer as the road foreman of the engine would be.

Q. Mr. Clark, do you think that Dr. Lockwood doesn't know what a trainman or flagman does?

A. I hardly think—

Mr. Sullivan: Your Honor, I think we're getting into areas of conjecture and opinion, and I object.

The Court: I'll sustain the objection to the last question.

By Mr. Frates:

Q. Do you have doctors that are available here in the Miami area that are members of the hospital staff?

A. Well, I don't know the exact arrangements. We do have doctors here that are listed on our time card, which we issue slips for the employee to go to these doctors.

Q. In fact, you have a number of them, do you not?

[fol. 39] A. Yes, there is. I don't know exactly how many of them.

Q. A number of very competent doctors.

A. That's right.

Q. Now, can you as trainmaster, when you think it's right, take someone out of service and send him to one of these doctors?

A. Yes.

Q. In other words, if you thought a man wasn't able to perform his job physically, you have the right to say, "I'm pulling you off the job. Go and see a doctor."

A. Yes, I have that authority. However, I usually discuss a man's physical condition with him before I ever proceed with any orders.

Q. That's right, but you have in the past taken a man like that and sent him to a doctor, haven't you, for a physical examination?

A. I don't know; I probably have, but off hand I don't remember a case.

Q. Incidentally, getting back to the doctor and the slip, if a man has been off for any reason, injured or ill, you don't put him back to work until he has that slip from the doctor that he can go back to work, do you?

A. No; in other words, if he's been off for any reason other than minor colds or anything like that, it's a require-
[fol. 40] ment that they furnish a CS Form 1.

Q. And what is CS Form 1?

A. That's just a release from the doctor that he has treated him, and in his opinion he has recovered sufficiently to perform the duties.

Q. He's recovered sufficiently to perform his duties. Right?

A. That's the doctor's opinion.

Q. Now, Mr. Clark, I asked you in your subpoena to bring the records with you relative to this alleged test that you gave to Bert Smith. Do you have your correspondence?

A. Mr. Sullivan has it.

Q. Is this the only correspondence that you have relative to the test and to Bert Smith?

A. That is the only—pertaining to the authority that I got for giving him that test.

Q. Is this the only correspondence you have relative to the test either prior or subsequent to when the test was made?

A. Well, do you mean Dr. Lockwood's letter? Is that—

Q. Let's read the subpoena and I'll ask you, sir, if that's all the records? Your subpoena reads, " . . . and bring all correspondence between you and any other person of the Florida East Coast Railway Company concerning
[fol. 41] the so-called field test given to Plaintiff, Bert Smith." Is this all of the correspondence relative to that field test?

A. No; it's not. The letter that I gave—in other words, I mean, in my writeup of it, no, it isn't.

Q. Where is the rest of the correspondence?

A. In my file, I think.

Mr. Sullivan: Your Honor, I'd like to have the record show that when Mr. Clark showed me this subpoena, I advised him that anything afterwards in terms of a witness statement was not properly called for by subpoena. He has produced exactly what I advised him to produce, which is the correspondence pertaining to this field test, and not any

statement he made under the supervision of the law department afterwards.

Mr. Frates: Your Honor, I think the true test was to have this man answer the subpoena, and they didn't move to suppress the subpoena, and then take the matter up before the Court to determine whether or not these were exceptions. They haven't moved to suppress the subpoena. We'll take it up later, to save time. We'll have it marked for identification.

(The document referred to was thereupon marked, "Plaintiff's Exhibit No. 1-A for Identification.")

The Court: I will note the position, and we will determine it later in argument.

[fol. 42] By Mr. Frates:

Q. Mr. Clark, in substance, you say that you asked Mr. Hamilton if you could make this field test?

A. Well, did you read that original letter?

Q. Your answer is, "Yes," isn't it, Mr. Clark?

A. I'll tell you, to be frank with you I haven't read that letter in quite some time. I don't know—I don't know whether I recommended in that letter to give him a field test, or recommend in there that he be requested to retire. I don't exactly know, because I haven't studied it.

Q. Now, prior to September of '56, a short period of time before that, Smith had been up to the hospital, had he not?

A. That's what I understand.

Q. Well, you know that from your own investigation.

A. Yes, I knew he was in the hospital; yes.

Q. Was he not sent back here with a letter from Dr. Lockwood saying that he was fit for duty?

A. I don't think—I think that he was sent back here for further treatment, and one of the local doctors administered further treatment and then gave him a release. I believe that was it.

Q. In other words, before this accident in September, 1956, he had what do you call your form number?

A. CS-1.

[fol. 43] Q. CS-1, from the medical department of the Florida East Coast or one of their doctors, that he was fit for duty as a flagman, didn't you?

A. I think it just said, fit for duty.

Q. Fit for duty, but he's a flagman.

A. That's right.

Q. Do you have a copy of that letter or that form?

A. I don't have.

Q. Have you seen it recently?

A. I think I saw it about a month ago.

Q. Who signed it?

A. I think it was Dr. Nash.

Q. Dr. Nash, one of your doctors?

A. Well, he's a local doctor, yes.

Q. But one of the local Florida East Coast doctors.

A. Yes.

Q. And by virtue of that letter, you put Bert Smith back to work, didn't you?

A. Yes, sir.

Q. Now, he'd been up there in the hospital with arthritis, had he not? He had some trouble with his legs?

A. Well, I don't know the nature of his illness while he was there, no.

Q. Didn't you make an attempt to find out what the difficulty was?

[fol. 44] A. No, sir, I do not. When a person is off for illness they come in and they furnish the call boy, the route caller, this form, CS-1. Those are then sent down to our office and then they're filed on the man's record. I never see them. I never see them.

Q. But you know in this case that he had a letter from Dr. Nash saying he was fit for duty.

A. Yes.

Q. And this was after he had gone to the hospital, and you don't know what it was for.

A. That's right.

Q. Mr. Sullivan—you heard him say in the opening statement that he had been up there to see about his knees.

A. Yes.

Q. You actually know that, don't you?

A. Yes; I've heard it, yes.

Q. How long has Bert Smith, to your knowledge, been as heavy as he is at the present time?

A. Well, I imagine ever since I've been knowing him, and that's approximately 15 years.

Q. In other words, as far as Bert Smith looks today, there's been no real change in his physical appearance, has there?

A. I don't think so.

Q. And he was operating as a flagman, was he not, during [fol. 45] this 15 years?

A. Well, I imagine most of it was.

Q. Well—?

A. Generally speaking.

Q. Doing the same duties that he was required to do back here in September, 1956.

A. Yes.

Q. Did you know through this period of time that he had trouble with arthritis?

A. Yes. I've known for a number of years that he had arthritis, or he had some stiffness of the joints, and I'm sure that I knew it was arthritis.

Q. And during that period of time you didn't take him out of the service, did you, Mr. Clark?

A. I didn't have the authority to.

Q. Did you ever make a request that he be taken out of service?

A. No, because I wasn't working with him. I was at that time—I hired out here as a trainman, and then later I was promoted to a conductor with trainman's rights, and I wasn't in any position to recommend anything.

Q. Well, sir, let me ask you this: During the period of time that you were trainmaster for the period of time that you were down here, did you ever take him out of service? [fol. 46] A. I've never taken him out of service till today, no, sir.

Q. But you had that authority, didn't you, that any time you wanted to—

A. Well, yes; I had the authority to relieve him and send him to the hospital.

Q. Send him to the doctor.

A. That's right.

Q. For an examination.
A. Yes, sir.

The Court: Gentlemen; to the members of this trial jury: We're going to recess this trial, and will reconvene in probably one of the two small courtrooms, one of the courtrooms on the side. We won't probably need this big courtroom, and can hear easier in the small courtroom. Tentatively, we will request that you report to the small east courtroom on this side of this floor, and if it happens we don't have it, we will move back into the big one where we started off Monday.

You are instructed that you are not to discuss this case or anything you have heard about it, or hear about it as it goes along while the testimony is being taken. I am not going to keep you together downtown, but will permit you to return to your homes and personal affairs until we reconvene tomorrow at 9:30.

You are to try this case and determine the issues of fact [fol. 47] based solely on the evidence and testimony adduced here to you, and on the law that I charge to be the applicable law after the testimony is completed. You are not to mention the trial or to dwell on any portion of the testimony until you have heard it all. Do you understand those instructions?

Are there any requests for any further instructions from the plaintiff?

Mr. Frates: No, your Honor.

The Court: From the defendant?

Mr. Sullivan: No, your Honor.

The Court: We will reconvene, gentlemen, at 9:30 tomorrow morning.

(Witness excused.)

(Thereupon the trial adjourned until Friday, July 26, 1957, at 9:30 o'clock a.m.)

[fol. 48]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
At Law, No. 38384-L

[Title omitted]

Transcript of Trial—Friday, July 26, 1957

Miami, Florida

[fol. 49] The Court: Is there anything to come to my attention before we bring the jury in, gentlemen?

Mr. Sullivan: No, sir. Dr. Lockwood is here, and would like to leave as soon as he could. That's all.

Mr. Frates: I'd like to finish with Mr. Clark if we can, because I don't think Dr. Lockwood could get away—when is the next train? Probably at noon, isn't it?

Mr. Sullivan: Yes.

Mr. Frates: We'll finish before noon.

Thereupon—

C. T. CLARK, the witness on the stand at time of adjournment, resumed the stand and testified further as follows:

The Court: Will the record note the presence of the trial jury this morning as we reconvene. Go ahead.

Direct examination (continued).

By Mr. Frates:

Q. Mr. Clark, we were talking about the authority to take him off of the run, or off of the train, and that's when you said yes, you had that authority. Right?

A. Yes.

Q. At any time that you thought he wasn't physically able to do—

A. Yes.

Q. Now, when you take him off you thought he wasn't [fol. 50] physically able to do his job—what would you do

with him under normal circumstances? Wouldn't you refer him to one of the medical doctors?

A. Yes, that's correct.

Q. Did you do that in the case of Bert Smith?

A. In this particular case it wasn't necessary.

Q. Would you answer the question, sir, yes or no? Did you do that in the case of Bert Smith?

A. You mean whether or not I sent him to a doctor?

Q. Yes, sir, whether or not you took him off of the train and sent him to one of your medical doctors.

A. I did not.

Q. Now, who is B. A. Collins? Is he another flagman?

A. Yes, he is.

Q. Did you make a test with him of the same type?

Mr. Sullivan: Your Honor, just a minute. I think we're dealing with Bert Smith. Your Honor, I think what happened to some other trainman or some other conductor isn't in the scope of the trial, and I object to it.

The Court: Sustain it.

By Mr. Frates:

Q. You ultimately ordered Bert Smith out to make this so-called field test, didn't you?

A. Yes, I instructed him.

Q. Tell the jury whether or not, to your knowledge, a [fol. 51] test such as you gave Bert Smith had ever been given to anybody on the Florida East Coast Railway?

A. Well, to my knowledge, no test has ever been given the same as this was given, in that to my knowledge, this is the only field test that has ever been given a flagman. However—

Mr. Frates: Your Honor, I object to his getting in a position to argue his case. I think that it doesn't call for any explanation. He has him on cross examination. I don't know what he's going to say.

The Court: I will sustain the objection.

By Mr. Frates:

Q. Now, where did you go to make this test?

A. At mile post 355, which is approximately—about 157 Street, I think.

Q. Now, did you approach Bert Smith several days prior to the making of the test?

A. I did.

Q. And what did you tell him at that time?

A. I asked Mr. Smith to consider his physical examination, and that should he desire to retire, that the railroad would be glad to go along and help him get the papers in connection with his retirement, and take steps—

Q. Didn't you tell him, Mr. Clark, that either he was going to retire or you were going to make him take a field test?

[fol. 52] A. I told him that should he desire not to retire, we'd perform a field test.

Q. But the first statement wasn't the whole story, was it?

A. That's correct.

Q. Actually, you went to him. Now, where was he when you went to him this time?

A. In the supply room downstairs in the Florida East Coast room.

Q. What was he getting ready to do?

A. Preparing himself to go out on a run.

Q. The run, I assume, is the train?

A. That's right.

Q. And where was he going?

A. Ft. Pierce.

Q. Did you take him out of the service at that time?

A. I did not.

Q. You had the authority to do it, didn't you?

A. Yes, sir.

Q. And you told him, in effect, "Bert, either retire or we're going to take you up here and make a field test."

A. Well, I told him in such a way that had he desired to retire, that we would certainly cooperate with him. And, in fact, I told him not to answer me then; go ahead and

think it over for a few days and make up his mind what he wanted to do.

[fol. 53] Q. Now, Mr. Clark, isn't and hasn't it been the history of the railroad when a man was unable to perform his duties and going to retire, that it became a medical question if it was for a physical disability? Weren't the doctors called in on all of these cases?

A. Well, yes, and the doctors will always be called in on a physical disability case.

Q. Now, did you at that time tell Bart Smith to go to the chief surgeon for a physical examination?

A. No, I didn't, because just prior to that he had just been given a release to return to work.

Q. He'd been given a release by your chief surgeon that he was able to perform the duties of a flagman?

A. I think it was by Dr. Nash.

Q. One of the members of the staff.

A. Yes.

Q. Of the railroad. Now, before you gave this test did you consult with Dr. Nash or Dr. Lockwood or any of the doctors on your staff, medical staff, and medical department?

A. No, I didn't, because as I say, that just prior to this test they had, it was in their opinion that he was physically able to perform the duties of a trainman.

Q. Mr. Clark, you knew, I think you testified yesterday, that Bert Smith had had hypertension and high blood pressure and things of that nature over a period of years. You were aware of that, weren't you?

[fol. 54] A. No, sir, I think yesterday I testified that I knew that he had arthritis, but hypertension and high blood pressure, I didn't know anything about.

Q. You didn't know that he had anything wrong with him?

A. No, I didn't.

Q. You just thought it was just a question of arthritis?

A. Yes.

Q. Which you testified yesterday that you knew he had had for a long period of time.

A. That's right.

Q. And he was still working as a flagman during that period of time.

A. Yes, that's correct.

Q. Did you consult with any doctor as to the possible harmful effects, if any, that this type of test that you devised would have on Smith?

A. No, I didn't, sir.

Q. And all you had to do was pick up the telephone, wasn't it, sir?

A. Yes.

Q. And call one of the doctors?

A. Yes, that's correct.

Q. Now, who went with you to give this so-called test? [fol. 55] A. The record foreman by the name of Johnson, special agent Bader, general chairman of the trainmen Baumberger, and general chairman of the O. R. C. & B., Delk, and Mr. Smith and myself.

Q. Now, I ask you if in the history of the railroad you had ever heard of this test being given before? I'll ask you if subsequent to this incident whether or not anybody —any flagman or any employee of the railroad has been given this type of test?

A. Not to my knowledge.

Q. So this was the Bert Smith test, wasn't it?

A. Well, it was a field test, but it was performed with Bert Smith.

Q. And in the history of the railroad there's only been one man ever given this test.

A. To my knowledge.

Q. And that was Bert Smith.

A. That was Bert Smith.

Q. Now, you ordered Smith to take the test, did you not, as his supervisor or his superior?

A. I didn't order him. I instructed him that after he he told me that he wasn't going to retire for the next four or five years—I instructed him that we would go ahead and perform the test, and he always seemed anxious to perform the test to prove to himself as well as to us, that he [fol. 56] could perform the duties of a flagman.

Q. You say you instructed him to go?

A. That's correct.

Q. You don't call that ordered.

A. Well, I think there's a little difference.

Q. Were you ever in the army where they made a request that you do something?

A. I spent four years in the army, and I was instructed most of the time.

Q. You were instructed. Sometimes they requested?

A. I never heard them request.

Q. And if you didn't do it, you went to jail—

Mr. Sullivan: Your Honor, I object to it.

The Court: Sustain it.

By Mr. Frates:

Q. But, actually, you ordered him there as his superior, didn't you? You sent him a letter and told him to report out there.

A. That's correct.

Q. This is something he didn't do under his own volition.

A. That's correct.

Q. Were you given a letter of protest by his representative, and incidentally, you invited him to have a representative there, did you not?

A. Yes, sir.

[fol. 57] Q. Do you have that correspondence, incidentally, that you wrote to him?

A. Yes, I know I have it somewhere, but I don't—it wasn't in those papers that you got yesterday.

Q. No, we just had two sheets of paper in that. Do you know where that file is?

A. I don't know off hand, but I'm sure I could get it in 15 minutes.

Q. Would you get it for us later on?

A. Certainly; be glad to, the letter that I instructed him to meet me—

Q. All of your correspondence.

A. Well, there was something brought up about that yesterday, and I don't know whether anyone hasn't told me —directed me yet to bring it over.

Q. Were you instructed, Mr. Clark—you received a subpoena, did you not?

A. I did.

Q. Were you instructed by the Court or anybody not to comply with that subpoena?

A. Only by my attorney.

Mr. Sullivan: Your Honor, Mr. Clark showed me that subpoena and brought over the papers pertaining to the field test. I advised Mr. Clark in my estimation, statements made by him afterwards were part of the work product. [fol. 58] They weren't properly called for by subpoena; that anything pertaining to the field test up until the time it was taken, was properly called for by subpoena. That's what the records were produced for.

The Court: The particular letter you're talking about was written before the field test?

Mr. Frates: I submit, Mr. Sullivan has no right to tell anybody whether or not they should comply with the subpoena. If he has any question, take it up with the Court. It isn't proper to tell somebody just don't bring them in.

Mr. Sullivan: The complete correspondence has been produced.

Mr. Frates: He's testified the complete correspondence hasn't, because there are other letters and things of that nature which he's already identified, and I think we ought to see that file and if there's questions in there about work product, that can be raised. But just to instruct somebody that you don't bring it in, I think is not compatible with an orderly process.

Mr. Sullivan: Your Honor, I think it's also true that you can have a subpoena issued by the Clerk, but that doesn't necessarily mean it's properly requested by the subpoena.

The Court: I will request that we take this matter up by the production of the alleged items, and we will consider [fol. 59] it outside the presence of the jury and the Court will make a ruling on it then.

Let's go ahead.

By Mr. Frates:

Q. Now, Mr. Clark, is that the letter that was given to you before the test was made?

A. I think it is, yes.

Q. Would you look at it, sir, so there won't be any question.

A. Yes, I'm sure it is. (Looking at letter.)

OFFERS IN EVIDENCE

Mr. Frates: We offer this in evidence.

The Court: Mr. Sullivan?

Mr. Sullivan: I have no objection.

The Court: Admit the item as Plaintiff's Exhibit 1 and number it, please.

(The letter referred to was thereupon marked, "Plaintiff's Exhibit No. 1.").

By Mr. Frates:

Q. Mr. Clark, did you read this letter, Plaintiff's Exhibit 1, before the test was made?

A. Yes, I did.

Q. And then I assume that this was a protest, but in spite of that you continued on with the test?

A. It was a protest to the type of test that was to be made, yes.

Q. But you continued on with the test, irrespective—

A. I did.

[fol. 60] Q. To save a little time so each juror won't have to read it, would you please read that to the jury?

Mr. Sullivan: Your Honor, I think the letter can be passed to the jury and they can view it later. It's in evidence, and I don't think Mr. Clark should be called on to read it.

Mr. Frates: I'll read it, your Honor.

The Court: It's in evidence. It may be read to the jury, but whoever reads it—

Mr. Frates: If you don't want to read it, I'll read it. You don't want to read it, Mr. Clark?

The Witness: Doesn't make any difference to me.

Mr. Frates: I'll read it, then.

By Mr. Frates:

Q. Incidentally, where were you when this letter was given to you?

A. 29th Street on the railroad tracks, at the caller's office.

Q. That's your office?

A. No, that's at the office of the chief caller.

Mr. Frates: "Mr. C. T. Clark, Trainmaster, Florida East Coast . . . " that's you; right?

The Witness: That's me.

Mr. Frates: " . . . Trainman—B. Smith. Dear Sir: You have under date of September 10, 1956, in a letter delivered at his home, ordered Trainman B. Smith to report to you [fol. 61] at Buena Yard Office at 8:00 a.m. September 13th (this date) to undergo some kind of field test which your letter does not reveal.

This is a most unusual procedure on this property for trainmen or a trainman and we as his representatives hereby protest against such requirement of Mr. Smith.

We may add for the record the following:

1. Trainman Smith employed as Trainman September 7th, 1920, and has generally worked regularly when his seniority permitted.

2. While he was ailing for past year or so, he contained . . . "

Mr. Frates: "Contained" is the word, but I think they mean "continued."

"to work as passenger flagman and on May 20, 1956, he obtained a 30-day leave of absence account of illness which was continued which was extended June 19, for additional 60 days to enable him to take treatments both by the Company's Chief Surgeon and his Staff at St. Augustine Hospital and by Company's Local Surgeon at Miami."

"On July 25th, Mr. Smith wrote Terminal Superintendent Norwood for an additional 60 days' leave to enable him to continue to take treatments directed by the Chief Surgeon of the Company at St. Augustine and Local Company's Surgeon, Dr. Nash, here at Miami [fol. 62] as directed by the Chief Surgeon.

3. Doctor Nash released Mr. Smith to return to work on August 16th, 1956, and he did return to work much improved and able to perform his usual duties.

4. Trainman Smith left Miami September 9th, 1956, and went to St. Augustine for a general checkup at the hospital the morning of September 10th, and Chief Surgeon Dr. Lockwood gave him a general checkup, including walking through the hospital hall, and informed Smith that he was able to work and to return to work as he was much improved, and that he would not "Bad Order" Smith as if he had, he would have then been in line for retirement pension.

5. Mr. Smith has worked on his run from authorization by company doctors from August 16th, including September 8th, when he laid off September 9th to go to St. Augustine for checkup by the Chief Surgeon as stated above and this checkup was not directed by the Company doctors but by Mr. Smith's desire that our chief surgeon look him over as many of our employees do.

6. The chief surgeon has always been the first and last word on this property as to employees' physical condition for work of their assigned duties.

We believe after long years of dealings with Chief [fol. 63] Surgeon Dr. Lockwood not only by the employees, but also as representatives of the employees that Dr. Lockwood is fully capable of determining the employees' physical fitness to perform their duties. Yours very truly, R. S. Delk, General Chairman, O. R. C. & B., and P. J. Baumberger, General Chairman of B. of R. T."

By Mr. Frates:

Q. That's the letter that you received at that time?

A. That's correct.

Q. Can you tell us briefly, what you did in the test?

A. Well, all we did was walk a mile. We started from 355 mile post and walked south to 356 mile post.

Q. And who is "we"?

A. That included both General Chairman Delk and Baumberger, and Mr. Smith, Road Foreman, H. F. Johnson.

Q. But you didn't walk together, all of you, did you?

A. We started out together.

Q. But you didn't walk all together.

A. No.

Q. You started out, and you sat down—

A. Right.

Q. How long did it take you to get down there?

A. Nineteen minutes and six seconds.

Q. Did you see Smith fall?

A. I didn't see him fall the first time, no.

[fol. 64] Q. How many times did he fall?

A. Well, from the information there that I received—because the general chairman of the conductors was setting with me when he fell the first time, and said, "Well, Bert Fell." And I says, "Well, I didn't see him." And then he says, "Well, he's up now," and then he walked a few more feet and fell again. And I saw him.

Q. Did you go back to him when he fell the first time?

A. No; no one went back to him.

Q. Did you go back to him the second time when he fell?

A. Yes.

Q. How far—would you say a few feet from where he fell the first time?

A. Well, I've forgotten the exact number of feet, but I think it was around 70 to 100 feet.

Q. You didn't see him fall the first time?

A. No, I didn't.

Q. How do you know how far he was?

A. Well, because Mr. Delk pointed out the place where he fell the first time, and I measured from there to where he fell the second time.

Q. Why did you measure?

A. Why?

Q. Yes.

[fol. 65] A. Because I was determining for the test—

Q. Why did you measure from the two distances?

A. Because I wanted to know how many feet he had walked before he had fallen the second time.

Q. What kind of surface was he walking on.

A. Standard—

Q. We don't know—

Mr. Sullivan: Your Honor, I think the witness ought to be able to answer the question.

The Court: Sustain it.

Mr. Frates: I agree with you.

The Witness: It was just a roadbed of the railroad. It was ballast. There was ballast under the crossties on the main line and, of course, we don't ballast the passing track facilities. Therefore, the passing track was on sand and the main line was on rock ballast.

By Mr. Frates:

Q. Were there any weeds or anything of that nature around there?

A. No more than in any other location.

Q. Mr. Clark, would you tell us whether or not there were any weeds and things of that nature around there?

A. Well, there was grass, yes.

Q. Were there weeds there?

A. Well, yes, there was some—I think they were referred to as gopherberry bushes or something like that.

[fol. 66] Q. Were they in the area Smith was walking?

A. Yes, they were.

Q. How far had Smith walked before he fell?

A. Well, it was a little better than 3,000 feet to where he finally quit.

Q. In other words, over a half mile.

A. That's correct.

Q. Now, how many times did he fall?

A. Well, actually, I don't know, other than just like I say, the general chairman told me he fell the first time and I saw him fall the second time. And he had—it appeared from the ground that he had crawled further south from the time he had fallen the second time.

Q. Now, I assume the test stopped; is that right?

A. That's correct.

Q. Did you go back to Smith?

A. Yes.

Q. What was his condition when you went back there?

A. Well, he was exhausted.

Q. Well, what did he look like, Mr. Clark?

A. Well, he was flushed, and I noticed he had some veins more prominent than ordinary on his face and nose.

Q. Was he on the ground?

A. He was.

Q. Of course, you knew from reading this letter that he [fol. 67] had been to the doctors for treatment?

A. Yes—well, he'd been to the doctors for an examination, and the doctor, I think—the letter said he was in good shape.

Q. Yes, sir, but you also knew he had been back there for illness as related in paragraph 2.

A. I knew that he had been discharged the 16th and given a form to return to work the 16th of August, which was a month prior to this test.

Q. Yes, sir, Mr. Clark, but in answer to my question, you knew from reading this letter before the test started, that he had been in the hospital in May of that year for illness.

A. Yes.

Q. And you, of course, didn't check with any doctor or anything to see whether or not it would be all right to give this test?

A. No, I didn't.

Q. Now, is there any rule or regulation of the Florida East Coast that prescribes such a test?

A. There's no—

Q. Would you answer yes or no, sir, if you can, and then if you want to explain, you can.

A. No, there's no direct rule in that book that governs that, such as many other cases that my duties require. There's nothing in that rule book that tells me to answer a [fol. 68] telephone. There's nothing in the rule book telling me that when I walk into a passenger car and there's water on the floor that I can tell the porter to clean it up. It's just part of my duties that are not described by any book.

Q. Mr. Clark, I assume that on cars there has been water on the floor many times?

A. Yes.

Q. And they clean it up?

A. Yes.

Q. But this is the only time that anybody in the history of the Florida East Coast ever gave this kind of test.

A. To my knowledge.

Q. To your knowledge.

A. Not this kind of test.

Q. This type of test that was given to Bert Smith.

A. That's right.

Q. We're not talking about water on the floor, are we?

A. We was talking about what the rule book described as my duties.

Q. You've got a Bulletin No. 1?

A. That's correct.

Q. And that prescribes duties, and it goes into some detail about various things that you should do and should not do, doesn't it?

[fol. 69] A. It applies to me. However, there's nothing in there that says what a trainmaster will do. It describes duties of the other employees.

Q. But you railroad folks live by the rules, don't you?

A. Yes, we're governed by rules, certainly.

Q. And here is your book which sets out the duties of trainmen and things of that nature. Right?

A. A partial list of them, yes, sir.

Q. And the timetable also has some rules and regulations. Right?

A. That's correct.

Q. Now, other than these three, are there any other rules and regulations other than special train orders?

A. Yes.

Q. What are those?

A. Signal book. We're equipped with a signal book.

Q. This signal book here?

A. Yes, sir.

Q. That's the block signal book.

A. That's the block signal book, and we're also issued a Conduct of Employees book.

Q. Does that have anything to do, actually, with the operation—

A. Yes, it does pertain to that.

[fol. 70] Q. But as far as the particular duties of each individual, does that cover that?

A. No.

Q. So in all of your regulations there is nothing in there about this kind of test. Right?

A. There's nothing in there that says that for me to go ahead and give these tests. But there's nothing in there that says for me not to give them.

Q. Is there any rule or regulation that precribes the distance that a trainman should walk from the end of a train?

A. Well—

Q. That says a specific distance.

A. That does not say a specific distance. It says—

Q. Mr. Clark, I think maybe if I ask the question—if you don't understand it, all right. But if you would say yes or no, and then if you like to explain your answer, you have the right to do it and we'll be glad for you to do that.

A. No, it does not say a specific distance.

Q. So there's no rule of the Florida East Coast Railroad that says a flagman shall be a certain number of feet from the rear of a train.

A. There is not. The rule says that they will go back a sufficient distance to insure full safety to the train.

Q. We talked about the block system yesterday. And, [fol. 71] of course, that's a safety device. Right?

A. It is.

Q. Could you tell us in your opinion, on your track—let's take a straight track,—how far an engineer in a cab could see another train up there if it were stopped, assuming normal weather conditions and normal eyesight?

A. On straight track?

Q. Straight track.

A. Well, he could see an outline of it, I guess, maybe two miles.

Q. Two miles. What is the maximum speed limit of the trains on the Florida East Coast?

A. Seventy-nine miles an hour is the maximum.

Q. Could you tell the jury on a passenger train such as Bert Smith was working, at 79 miles an hour how long it would take it to stop?

A. Well, that's a little out of my line, but I know it takes with a normal service application, it takes approximately

a mile. It might be slightly under a mile, but approximately a mile.

Q. A service application is just where you sort of let her coast down and gradually apply the brake?

A. No; a service application—if he's intending to stop, he wouldn't just kind of slow it down. He would go ahead and make a normal stop such as you would do in your auto-
[fol. 72] bile if you were driving your automobile. If you wanted to stop at a specific place you'd regulate your brake the same way.

Q. The brakes are actually operated by air, and you apply the pressure on them and the amount of pressure you apply determines the degree of stop that you make.

A. That's correct.

Q. Just like you put your foot on there. Now, a service application—when a fellow comes into a station or is going to try to stop you try to make a smooth stop, don't you?

A. That's correct.

Q. And that requires just a gradual reduction of the brake.

A. That's correct.

Q. And that takes about a mile, you would say, just roughly?

A. Roughly, a mile.

Q. Now, you also have an emergency brake on there, don't you?

A. Yes.

Q. And that releases the full pressure.

A. That's correct.

Q. And stops your train very suddenly.

A. Yes.

Q. And that's to be used in emergency.

A. Yes, only in emergency. We steer clear from that
[fol. 73] all we can on account of—in order to keep from injuring a passenger.

Q. But it's there to be used.

A. It's there to be used.

Q. And you do use it?

A. In an emergency, yes.

Q. Can you tell the jury approximately at your maximum speed at 79 miles an hour, approximately how long

it would take you to stop a train with an emergency application?

A. I'd be hesitant to say, because I'm really not familiar—

Q. But, anyway, it's the emergency and it would be considerably less than your normal service application.

A. Yes, it would.

Q. So it would be considerably less than a mile, and you don't wish to say what the distance is?

A. No, I do not.

Q. As trainmaster, sir, you're not familiar with the stopping distances of your trains?

A. No, sir, because we have road foremen of engines that look after the engineers and the firemen, and supervise their applications and brakes—the engine part. The mechanical part, I don't mess with.

Q. But you're in charge, aren't you, of the actual operation of the entire train?

[fol. 74] A. That's right.

Q. And you don't know on emergency application how long it takes to stop your various trains?

A. Well, I wouldn't say because it would depend largely on how many cars they had in a train, the type of equipment, and various other things.

Q. We were talking about the passenger train that Smith was on, taking that as an illustration.

A. I wouldn't say. I'd rather you asked the road foreman of engines.

Q. You don't have any idea?

A. No, I don't.

Q. And you're a trainmaster.

A. I'm a trainmaster.

Q. In charge of all the operations.

A. Yes, sir.

Q. Now, we talked about some fusees yesterday. I hand you this and ask you if this is what you railroad men call a fusee?

A. Yes, that is a fusee.

Q. Is that the kind that's used by the flagmen and by the railroad?

A. It's the same type. I don't know—

Q. In other words, it looks about the same.

A. It's the same type.

[fol. 75] Mr. Frates: We offer this.

Mr. Sullivan: I have no objection.

The Court: Admit the item and mark it as a plaintiff's exhibit.

(The fusee referred to was thereupon marked, "Plaintiff's Exhibit No. 2.")

By Mr. Frates:

Q. Can you show us how—this obviously, is a spike; I assume you put it down in the ground or—

A. On the crossties.

Q. On the crossties to hold it upright?

A. That's right.

Q. Can you take this fusee, Plaintiff's Exhibit 2, and show us how you would activate it?

A. Well, you take—shall I do it? Do you want me to go ahead and break the cap on it?

Q. Will it start it?

A. It won't start it by breaking the cap. This is the same that's on an ordinary penny matchbox, just where you strike the match.

Q. Mr. Clark, suppose you come on down here and then all of the jurors can see it—

A. —This is the same material that is on the side of a matchbox, and this is the cap. You strike this against that, the same as you would a match head, and then it flares.

Q. If you activated that now, what will happen?

[fol. 76] A. Well, it would be dangerous because it's phosphorus that comes out of the top when you first strike it, and it runs down the side.

Q. Then what happens after it starts?

A. Well, it makes a red flare.

Q. Is it red or blue?

A. It's red.

Q. How about the smoke that comes out of it?

A. Well, the smoke—shall I sit down, or do you want me to stand?

Q. Yes, sit down—
A. —The smoke has a bluish-white tint.
Q. Do you want to show that to the Judge?
A. Yes—

The Court: I could watch it all right.

By Mr. Frates:

Q. Now, yesterday you weren't sure how high the smoke went up after using one the other day. I wonder if you haven't activated one since you testified; have you?
A. No, I didn't. No, I didn't, and I'm still not—
Q. You still wouldn't want to tell this jury how high that smoke goes up?
A. No, because when those fusees are first ignited the smoke comes up and for about a very short time, say, maybe half a minute, you have—from the explosion when it ignites, [fol. 77] you do have the smoke, but it depends entirely on—in other words, in a room like this you'd have it more than you would under normal working conditions.
Q. Well, on the track, you still couldn't tell us?
A. No, it would be an impossibility to say, because there are too many factors in there that would be involved.
Q. Well, if there were no wind or very little wind, how high would the smoke go?
A. I'm sorry, I can't answer that.
Q. And it smokes for a considerable period of time, doesn't it?
A. Well, as it burns down, of course, it doesn't smoke near as much as it does when it's first ignited. That's when you get your first smoke, the majority of the smoke—is when it's first ignited.
Q. But the smoke lasts for a considerable period of time, doesn't it?
A. We're right back to where we was. It just depends entirely on the weather conditions.
Q. That's part of the warning device, the smoke, as well as the flare, isn't it?
A. No; the smoke isn't intended for a warning device. That smoke is merely from the phosphorus in the head on the cap of the fusee.

Q. Well, the fusee is so that somebody approaching the [fol. 78] train can see it, isn't it?

A. That's correct.

Q. And that's the way it was constructed.

A. That's correct.

Q. And whatever is there to see, it's there to help see. Now, let's take this fusee on a day, let's say, like today, on the track, and you lit this fusee. How far could you see this down the track if you were up in the cab of an engine?

A. Well, that, again, would depend on whether or not you were on straight track.

Q. Well, let's take straight track.

A. It would also depend on how the time of the day—in the morning hours you can see better than you could at noon.

Q. Let's take the time of day that you ran this test.

A. I think we started this test at 9:02 in the morning.

Q. Let's take 9 o'clock on a straight track where you were when you made this test.

A. Well, there's a curvature in that track there. I'd estimate that an engineer should be able to see that fusee within a half mile.

Q. He couldn't see it longer than a half mile, Mr. Clark? [fol. 79] A. Well, again, it would depend on your weather conditions. I mean, in other words, I couldn't set here and say you could see it for a mile, because we've had cases—in fact, in that same location, at 163rd Street last year we had an engineer that came around that curve and ran a lighted fusee at that 163rd Street crossing.

Q. What did you do—give him some demerits?

A. We disciplined him.

Q. You disciplined him?

A. Yes.

Q. It was the engineer's fault, wasn't it?

A. The engineer's and the fireman, both.

Q. Because they didn't see it?

A. That's right.

Q. Because they didn't see it.

Mr. Sullivan: Your Honor, I object. He keeps going off and off—

Mr. Frates: Your Honor, I submit that Clark got off and is trying to argue the case, and he gets into something that has no application—

Mr. Sullivan: Your Honor, Mr. Frates is trying to argue with him. That's what's happening.

Mr. Frates: He volunteered that, and it doesn't turn out to be the fusee at all.

The Court: I will sustain the objection to the last ques-
[fol. 80] tion. Let's go ahead with the facts we have here.

By Mr. Frates:

Q. At nighttime how long could you see this fusee?

A. Well, at night you'd be able to see it a considerable distance than in the daytime, if it was on straight track and under good weather conditions—you'd probably be able to see it a mile, maybe a few feet further than a mile.

Q. Could you see it as far as two miles?

A. I hardly think so.

Q. It's a very bright flare, isn't it, the light?

A. It is.

Q. And it's built with that idea that it is a flare, so that it will attract the attention of the engineer?

A. That's correct.

Q. And they, of course, are instructed when they see one of these, a fusee, to stop their train, aren't they?

A. That's correct.

Q. And that's one of the duties of a flagman, to get off the train and put this fusee down in the track or some place where they can see it. Right?

A. Yes, that's correct.

Q. Incidentally, have you made a test to see how far down straight track, say, in the morning around 9 o'clock, how far you could see this fusee?

A. No, I haven't.

[fol. 81] Q. Do you know whether anyone else has?

A. Not to my knowledge.

Q. So that's in addition to the block system; so you have the fusees, the torpedo and the block system.

A. That's correct.

Q. As safety factors.

A. Yes.

Q. After Smith fell and you went back there, what happened to Smith?

A. Well, when I arrived back where he was, Mr. Baumberger and road foreman of engines, Johnson, were picking Mr. Smith up, and then he was placed in Mr. Baumberger's car, who in turn, carried him to the doctor.

Q. What doctor did they take him to?

A. I do not know. I think it was Dr. Nash, but I'm not for sure.

Q. Did you order them to take him to a doctor?

A. No, it was already settled when I got up there that he was going to the doctor.

Q. And where did you go after that?

A. I came back to town.

Q. Now, did you find out later what his condition was?

A. I got the information from the clerks. I didn't call the doctor. I didn't get the information from the doctor. [fol. 82] And the clerk—

Q. Did you make any attempt to find out from the doctor what was wrong with him, if anything?

A. Not personally, I didn't. The clerk did.

Mr. Frates: No further questions.

Cross examination.

By Mr. Sullivan:

Q. Mr. Clark, how long have you been trainmaster on the particular division you're on now?

A. Since June the 15th, last year.

Q. And prior to that time where were you, sir?

A. I was on the Ft. Pierce-Lake Harbor branch.

Q. Was Bert Smith working on the Ft. Pierce-Lake Harbor branch?

A. No.

Q. And prior to the time you were trainmaster out there, what were you doing? What was your duty?

A. I was trainman and conductor working between here and Ft. Pierce.

Q. So that until you became trainmaster down here in Miami, you didn't have any supervision or authority over any employees, such as conductors or trainmen?

A. No, I did not.

Q. At least, in this area.

A. That's correct.

[fol. 83] Q. And Bert Smith has been working the main line run from Miami to Ft. Pierce?

A. That's correct.

Q. Now, referring to the rules of the transportation department, Mr. Clark, I believe it refers to some—sets out in certain rules some of the duties as trainmaster. I'll ask you if last year at the time this test was made, Rule 350 was in effect, which proves that trainmasters report to and receive their instructions from the superintendent of transportation.

A. It was in effect, yes, sir.

Q. Will you tell me if Rule 351 was in effect, which provides, "They are in immediate charge of the train and yard service, of the movement of traffic within their respective divisions or districts, and of employees engaged therein."

A. Yes, that's in effect.

Q. I'll ask you the same question about Rule 352, sir, which reads, "They are responsible for the organization of train crews and for the maintenance of an adequate force in train service. To this end they will employ trainmen and will recommend to the superintendent of transportation the promotion or employment of conductors."

A. That's correct.

Q. All those rules were in effect at that time?

A. Yes, sir.

Q. Now, before making this field test with Mr. Smith and [fol. 84] the representatives he had with him, to whom did you go for authority, Mr. Clark?

A. The superintendent, Mr. Hamilton, who is from New Smyrna Beach.

Q. And you received authority from him in this letter which has been marked for identification.

A. I did.

Mr. Frates: Your Honor, I object to the question of authority. I don't think he had any authority. He might have written a letter, and the letters speak for themselves. We ask they be offered in evidence, and in fact, we'll offer them in evidence at this time.

Mr. Sullivan: We can't offer them until we get our case, your Honor.

Mr. Frates: I will stipulate and put them in evidence so you can refer to them, because I think they're the best evidence of what permission or authority or whatever he wants to call it—

The Court: Do you have any objection to the letter?

Mr. Sullivan: No, sir.

The Court: Mark the letters as a plaintiff's exhibit.

(The letters referred to was thereupon marked, "Plaintiff's Exhibit No. 3.")

By Mr. Sullivan:

Q. Plaintiff's Exhibit 3, Mr. Clark, is a letter or a yellow sheet which seems to be a copy of a letter from you to Mr. [fol. 85] Hamilton dated August 24, 1956. Do you remember writing that letter, sir?

A. I wrote a letter during that time.

Q. And a white sheet attached to it seems to be signed by Mr. I. E. Hamilton, addressed to you and dated September 4, 1956. Do you remember if you received a letter from Mr. Hamilton pertaining to this test at about that time?

A. Yes, I did.

Q. I believe you've known Bert Smith for a number of years, Mr. Clark.

A. That's correct.

Q. Has he been working as a passenger train flagman in the main, during the last few years and the years you've known him?

A. Yes. However, when I first knew him he was working on a freight train.

Q. Well, the various jobs on the railroad depend on seniority, don't they?

A. That's correct.

Q. When a man first goes to work as a trainman, he is at the bottom of the list. Everyone above him on the list has a choice of jobs.

A. That's correct.

Q. And he can get what's left over after everyone ahead of him chooses jobs.

A. That's correct.

[fol. 86] Q. So as Bert Smith worked up the trainman's list he got more and more choice jobs.

A. That's correct.

Q. And when his seniority allowed, he went to work as a flagman.

A. That's right.

Q. Has he ever worked as a conductor?

A. No, he has not.

Q. Can you tell me what the duties of a flagman are, generally, Mr. Clark, on a passenger train?

A. Well, a flagman's duties on a passenger train require him at each stop to get on the ground with flagman's signals, in order if it does become necessary, he'll be able to go back and protect the train.

Now, the flagman on these passenger trains—when the train is en route, look over the train around the curves. That's their primary duties. And the reason that we have flagmen on these passenger trains is that should an emergency arise, they're there to protect the lives of the patrons of the railway.

Q. Well, Mr. Clark, when a train is in motion and a flagman is on the train, does he have to be on his feet all the time, or what are his duties?

A. No, he doesn't have to be on his feet all the time. His duties consist of looking out of the vestibule door [fol. 87] around curves to see whether or not the train is in proper working condition.

Q. And, actually, if you're not going around curves he doesn't have much to do; he can just sit down and watch the world go by.

A. That's correct.

Q. And when the train stops the flagman has to get down off the train and stand by the rear of the train.

A. That's correct.

Q. If there's no emergency he just gets back on, the train starts off and he sits back down again.

A. That's correct.

Q. Or if there is an emergency, that's when he has to go back.

A. That's true.

Q. So his job in the main, is a job that he's there for an emergency purpose—that if things are going along normally he doesn't have much to do. If there's an emergency, that's when he's called into play.

A. That's right.

Q. Now, among trainmen and conductors how does a flagman's job compare in difficulty with the other jobs trainmen are called on to perform?

A. Ask me that again, please.

Q. I said, among trainmen and conductors—I'm not talk-
[fol. 88] ing about firemen or engineers—people who are up on the engine, but among other train crew employees how is a flagman's job considered in degree of difficulty with other jobs they are called on to perform?

A. Well, it's the easiest job on the train. The conductor, of course, is in charge of the operation of the train while it's in motion, and also at the stations. And it's his duty to go from one end of the train to the other to collect tickets and other operational needs. And the baggagemaster is the one that loads and unloads baggage at each station.

So the flagging job is a preferred job.

Q. As to these block signals on the railroad, Mr. Clark, is there a block signal for both the north and southbound traffic?

A. There is.

Q. Now, approximately how far apart, say, referring to the northbound main line, how far apart is each block signal from each other?

A. About a mile.

Q. Approximately a mile?

A. Yes, sir.

Q. That would also be true for the southbound traffic?

A. That is correct.

Q. Now, there's one area on the railroad, a single track [fol. 89] for several miles, isn't it?

A. Yes, that's between Titusville and New Smyrna Beach.

Q. In terms of when a flagman goes out in the event of an emergency, say, there's been an accident or a train stops for some reason, or there's a mechanical failure, how far back in your opinion, should a trainman go to assure adequate protection?

A. He should go back at least to the preceding block to see that the engineer has a red block; that's approaching. And then he should walk back further and put down two torpedoes and walk back toward the block and put a fusee out.

Q. Mainly, then, he goes back to the block behind him to see if that block is operating or not.

A. That's correct.

Q. If that block is operating, he can depend on that to stop an oncoming train?

A. In addition to that red block, though, he's required to put down a fusee and torpedo.

Q. And, of course, if the block should be inoperative,—he's the one you're depending on entirely to stop any oncoming trains.

A. That's correct.

Q. Mr. Clark, again referring to the rules of the transportation department, Rule 99, let me read part of this [fol. 90] rule to you and ask you if this was in effect last year in September.

Mr. Frates: Mr. Sullivan, can we put the rule book in evidence? I will stipulate—I was going to put mine in, but if we are going to read the rules, we ought to put the book in evidence.

Mr. Sullivan: Fine.

Mr. Frates: Or we can just read them and we can use either one of our books on the rules we use.

Mr. Sullivan: All right.

By Mr. Sullivan:

Q. Mr. Clark, I'm reading Rule 99. "When a train stops under circumstances in which it may be overtaken by an-

other train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fusees." So that any circumstances he has to go back and put down torpedoes and then they, in addition, put down fusees besides the torpedoes.

A. Yes, that's correct.

Q. What are torpedoes? Can you describe those, Mr. Clark?

A. Well, th y're about the size—larger than a quarter and less than the size of a half dollar, and they're equipped with two metal straps or lead straps, and you take the straps and bend them back like that (Indicating) and then clasp them over the top of the rail. And then a train comes [fol. 91] along and explodes the torpedoes. That's an indication that there's something ahead of him.

Q. So that to make the torpedoes effective you have to go back far enough so that at the time they're exploded by the engine of an oncoming train, there's sufficient distance between where the torpedoes are and the end of the train ahead of him?

A. Yes, that's correct.

Q. And the rules require you to go back a sufficient distance to put down torpedoes, and if necessary, to put down fusees, too?

A. Yes, that's correct.

Q. Now, Mr. Clark, prior to the time this field test was held, did you yourself have occasion to observe Bert Smith when he was working as a flagman?

A. Yes, I have.

Q. Can you tell us what you observed about his ability to do his work, and if you can recall any specific examples, give us those.

A. Well, I can't recall any specific example. It was just the observation of him, the way he walked, and in my opinion, I didn't think—

Mr. Frates: Your Honor, I object to that—he can't recall any specific examples, and in his opinion—I think he's now encroaching on medical testimony. If he wants to say [fol. 92] something abou' what he physically observed, all

right, but I don't think it's proper for him to express an opinion.

Mr. Sullivan: Your Honor, Mr. Clark has been called on for opinions for the last hour by Mr. Frates. He's the man in charge of these employees. I think he's eminent to qualify—

Mr. Frates: He's not a doctor, and if he wants to say what he saw and what he observed, I have no objection to it. If he says he can't think of any specific examples—now, he says, "In my opinion . . ."

The Court: I will sustain the objection as to his opinion. He can tell us what he observed and what he saw.

By Mr. Sullivan:

Q. Mr. Clark, I'll ask you the question that way. What did you observe about Bert Smith?

A. That it was difficult for him to walk, and that—well, for example, in Ft. Pierce I've seen him walk around the passenger trains. That's the terminal. We have to make brake tests there, and you could tell he was more or less exhausted when he completed the test.

And various other observations that it was—his physical condition wasn't that he could properly flag a train in an emergency.

Q. Did you ever observe him getting on or off trains, Mr. Clark?

A. Yes, I've had occasions to do that.

Q. What did you observe on those occasions about his [fol. 93] getting on and off trains?

A. Well, one night on Train 29 we stopped at Salerno, and he took the step box down, got down on it, and then when the train was ready to depart he threw the step box up and put his knee on the step in order to pull himself up. In other words, he couldn't reach the bottom step with his feet.

Q. Now, after observing him as you've mentioned, what did you do in terms of your dealings with Bert Smith? Did you get in touch with him, personally?

A. Yes, I did, personally; I went to Mr. Smith and asked him about his physical condition and asked him would he desire to take his pension.

Q. What did he say?

A. He said no, that he anticipated working four or five more years.

Q. Now, what did you do after that?

A. After that is when this field test was made.

Q. Now, getting back for a minute to the duties of a flagman, Mr. Clark, he'd been required to go out in the rear of the train—not just at 9 o'clock in the morning when the field test was made, but any time of night or day if the circumstances required.

A. That's correct.

Q. Suppose he had to go back at night. What equipment does he use to see along the track to see where he's walking? [fol. 94] A. He has an electric lantern. It would run off a battery.

Q. Now, you wrote to Mr. Hamilton and you received a reply from Mr. Hamilton, and then wrote a letter to Bert Smith telling him to take this field test?

A. Yes.

Q. Where did you meet him on the morning that the test was to be held?

A. At the chief caller's office at 29th Street and the railroad track.

Q. And you said there was a Mr. Delk with him, and a Mr. Baumberger?

A. That's correct.

Q. Each one was the chairman of one of the brotherhoods, one really the conductor's union, and the other was chairman of the trainman's union. And they were there as representatives for Bert Smith when he made this test?

A. That's correct.

Q. And in a letter you wrote to him did you authorize him or tell him he could bring someone with him?

A. Yes, I did; I told him he could have the representative of his choice.

Q. And he brought two with him.

A. That's correct.

Q. Now, this letter that is marked, "Plaintiff's Exhibit [fol. 95] 1"—Mr. Frates read it a moment earlier. This letter was read to you or handed to you by Mr. Delk to Mr. Baumberger?

A. It was handed to me by Mr. Baumberger at the yard office at 29th Street.

Q. And in this letter just before the test was to start, they represented to you that, ". . . Trainman Smith left Miami September 9, 1956, and went to St. Augustine for a general checkup at the hospital the morning of September 10, and Chief Surgeon, Dr. Lockwood, gave him a general checkup, including walking through the hospital hall and informed Smith that he was able to work and to return to work as he was much improved . . ."

That was a representation they made to you just before this test started.

A. That's correct.

Q. Now, you mentioned that you walked from one mile post to another mile post, Mr. Clark.

A. Yes, sir.

Q. Could you tell us how mile posts are numbered?

A. They're numbered consecutively, starting at Jacksonville, and each mile there's a post with the total number of miles from Jacksonville where the post is located.

Q. Where is mile post 1? Is that in Jacksonville?

A. Mile post 1 is in Jacksonville, yes, sir.

Q. So that the highest mile post would be the farthest south.

A. Florida City, yes.

[fol. 96] Q. Which mile posts did you have this test between?

A. Mile post 355 and 356.

Q. So that the test was run in a southerly direction, then.

A. Yes, sir.

Q. Now, when you got to mile post 355 you were there and Mr. Johnson, the road foreman of engines was there; Mr. Smith and his two representatives and Mr. Bader, the special agent.

A. Yes, that's correct.

Q. Did you check the time when you started out then?

A. Yes, sir; we all compared watches with the exception of the special agent; special agent Bader is not required to carry a standard watch. We all compared watches and in addition to that, Mr. Johnson the road foreman of engines, had a stop watch that he requested Mr. Baumberger

and Mr. Delk as representatives of Mr. Smith, to see that it was setting on zero, that he was going to check the mileage, or the time it would take to walk a mile.

Q. Now, when you started out who was walking with whom, Mr. Clark?

A. Well, we started out as a group, the five of us; Mr. Bader didn't participate in the walking. Then in a very few feet, why, Mr. Johnson and myself were in the lead and we were followed by Mr. Delk and Mr. Baum-
[fol. 97] berger, and then Mr. Smith was last.

Q. So that you and Mr. Johnson were walking together. Then there was a distance, then Mr. Delk and Mr. Baumberger.

A. That's correct.

Q. And then there was a distance, and then Mr. Smith was walking along in the rear.

A. Yes, sir; that's correct.

Q. Before the test started did you explain to Mr. Smith and his representatives what it was to be?

A. Yes, I explained that at the yard office at 29th Street before we ever went to the mile post.

Q. What time did the test start, Mr. Clark?

A. Well, we met at the yard office at 8 o'clock in the morning, and drove to mile post 355 which is in North Miami Beach, and on arriving there we had planned to start at 9 o'clock but there was a freight train coming south so I said, "Well, we'll just wait now until the train passes until we start."

So it was actually 9:02 when we started the test.

Q. And you walked down the tracks for a mile?

A. Yes, sir.

Q. When you got to the other mile post what did you do then?

A. Compared watches with Mr. Johnson to see how long it had taken us to walk.

[fol. 98] Q. That's when you found it had taken you slightly more than 19 minutes.

A. Nineteen minutes and six seconds.

Q. Did Baumberger and Delk come up after you had arrived there?

A. They walked the distance in 23 minutes.

Q. When they got up to where you were, where was Mr. Bert Smith?

A. About 22 or 2300 feet north of us.

Q. So that they arrived there and he was some 2,000 feet or so behind them.

A. Yes, sir.

Q. It was after you arrived there that Mr. Delk said something about he saw Mr. Smith falling?

A. Yes.

Q. What did Mr. Delk do then?

A. Set there until Mr. Smith had fell the second time.

Q. What did you do at that time?

A. Jumped up, and he said, "It looks to me like you all stuck your neck out this time," and started down north down the track to where Mr. Smith had fallen.

Q. Did Mr. Baumberger and Mr. Bader go back?

A. Mr. Bader was on the crossing at 146th Street to control any vehicular traffic while this test was being made, [fol. 99] and he had driven down opposite the mile post, which was then about a hundred feet east of the mile post, and I had hollered and asked Mr. Bader to drive Mr. Baumberger back down to the 355 mile post where he could pick up his car.

Q. So do I understand you correctly, that Mr. Bader and Mr. Baumberger went back to Mr. Smith first?

A. Yes, they were in my car and they saw him fall on the way back to get Mr. Baumberger's car, and they stopped. In fact, Mr. Johnson and Mr. Delk and myself had all started on foot back there, and then we saw Mr. Bader and Mr. Baumberger stop in the car so we didn't see any necessity of continuing to run.

Q. When you got back to Mr. Smith did he say anything when you got there?

A. Well, he wasn't very coherent but he did say that he had just started off too fast.

Q. Can you remember his saying anything else, Mr. Clark?

A. No, I can not.

Mr. Sullivan: Those are all the questions I have, your Honor.

Mr. Frates: Does your Honor want us to go on, or do you want to take a break?

The Court: I was going to finish him and get the doctor.

[fol. 100] Mr. Frates: I have a few more questions. We've been going pretty steadily.

The Court: All right. Let's take a recess.

Take the jury out.

(Thereupon a short recess was taken, after which the following proceedings were had:)

Redirect examination.

By Mr. Frates:

Q. Mr. Clark, just a few more questions. You mentioned about going back to the other block and checking it. Is there any rule or regulation that says that you should go back to the other block signal and check it?

A. To my knowledge, there isn't. The only—

Q. There is not?

A. There is not, no.

Q. Now, actually, the purpose is to give sufficient warning so the train won't hit another train. That's the whole idea, isn't it?

A. That's the whole idea.

Q. Are you familiar with Rule 71, I think, on your '57 Bulletin 1, which is part of your rules and regulations, or 70 of the old one? Are you familiar with that, where in an automatic block signal territory—and that from Miami to Ft. Pierce is automatic block signal territory, isn't it?

A. Yes, it is.

[fol. 101] Q. That where automatic block signals are operated that under certain conditions the flagman helps the conductor with the passengers?

A. That's only speaking of Trains 29 and 30.

Q. That's right, but I mean regardless of what train it is, that's the train—

A. Yes.

Q. And in an automatic block signal system your railroad has got a rule that says under those circumstances on 29 and 30, the flagman can help the conductor with passengers getting on and off the train, can't he?

A. Yes.

Q. And that's in an automatic block system?

A. Yes.

Q. And you have an automatic block system from Miami to Ft. Pierce?

A. We do have.

Q. Now, you say that you observed Bert Smith, that it was difficult for him to walk. When was that?

A. Well, ever since I've been here, which was June 15th last year.

Q. Actually, Bert Smith has had difficulty walking ever since you've known him, hasn't he?

A. Yes.

Q. But he still has been left as the flagman on the rail-
[fol. 102] road, hasn't he?

A. Yes.

Q. Back in June did you take him out of service?

A. No, I didn't, but I observed him almost daily to see if he was improving or whether he was failing.

Q. But you didn't take him out of service, but you said you had the right to do it at any time.

A. No, I didn't.

Q. Now, Plaintiff's Exhibit 3, you wrote to Hamilton. I assume this is a copy of the letter which you wrote. You've identified it.

A. Yes.

Q. Reading that letter, that's to Mr. Hamilton, the Superintendent, "I have on several occasions observed the performance of Trainmen B. A. Collins and Bert Smith, and wish to advise that should an emergency arise that required their going to the rear of the train a considerable distance to flag, their physical condition is such that they would be unable to do so properly, and I personally feel that the matter should be looked into concerning these two employees, in an effort to persuade them to retire."

Now, actually, you included Collins, B. A. Collins, in that letter, of course. Now, who is Collins? What is his job on the railroad?

Mr. Sullivan: Your Honor, if we are going to get into
[fol. 103] Collins, this trial is going to go into next week. I object to the question. I think we're concerned with Mr. Smith.

Mr. Frates: Your Honor, one of the contentions here is that this was not an authorized test. This was something that was specifically pointed out for Bert Smith and that, as we told the jury, it was a spite test in an effort to get rid of him.

Mr. Sullivan: Your Honor, if Mr. Frates is trying a labor case he's in the wrong court.

Mr. Frates: I'm not trying a labor case.

Mr. Sullivan: That's what this seems to come down to.

Mr. Frates: No, it doesn't, your Honor.

Mr. Sullivan: That's what all these remarks all morning have been directed to. That isn't the theory of the case.

Mr. Frates: The theory is that they had no right to take him out there and when they do a wrongful act—

Mr. Sullivan: We better get in a court that has jurisdiction of a labor case.

The Court: The last question was only to the question about Collins.

Mr. Frates: I asked, what is Collins' duty?

The Court: I will sustain the objection to that question.

By Mr. Frates:

Q. Now, the reply to that letter, the authorization, as [fol. 104] you call it, from Hamilton just said, "Give the test to Smith," did it not? Instead of reading the letter, that's what it says.

A. There were separate letters on each case.

Q. It was?

A. Yes, and my replies that I received from the superintendent.

Q. Did anybody but Smith get this test?

A. No.

Q. Did you know at the time before you went up there, that Smith was having difficulty walking and getting around?

A. I knew that his condition seemed the same as it had been for several—for a month or so.

Q. Would you answer my question, Mr. Clark? Did you know that he was having difficulty walking and getting around?

A. Yes, I knew.

Q. And you knew he had been in the hospital?

A. Yes, I did.

Q. And in spite of that, you took him up there without contacting any medical doctors or getting any medical advice as to whether or not that would be a proper test, or whether or not it would be dangerous in any way.

A. That's correct.

[fol. 105] Mr. Frates: Your Honor, I would like—and I think possibly we can do it when we come back—I would like Mr. Clark to take one of these fusees. We have an extra one, and I think we can do it right out here on the track—ignite the thing so the jury would have an opportunity to see it.

The Court: I will note your request. You don't want to do it right now, do you?

Mr. Frates: No, sir, because I think we can save time by doing it maybe after we come back from lunch, or before.

You can do it right out here on the track, can't you, Mr. Clark?

The Witness: Yes.

Mr. Frates: It would just take a few minutes.

The Witness: Sure.

Mr. Frates: This fusee is the same type as the one that we have here.

The Witness: Yes. I have some over in the car.

Mr. Frates: We'd rather use this one, if you don't mind.

The Witness: All right.

The Court: Any other questions of Mr. Clark?

Mr. Sullivan: Yes, I have a few more.

Recross examination.

By Mr. Sullivan:

Q. On Trains 29 and 30 if there's an emergency, is the [fol. 106] flagman still required to go back?

A. Yes, he is.

Q. And duties on those trains is no different than on any other trains.

A. That's correct.

Q. You observed Bert Smith. Then you wrote this letter to Mr. Hamilton. Right, sir?

A. That's correct.

Q. And you received a reply from Mr. Hamilton.

A. That's correct.

Q. And the reason you wrote to Mr. Hamilton was because of your observations of Bert Smith, and the fact that you personally didn't feel that he would be able to perform the duties of a flagman in an emergency situation?

A. That's correct.

Q. And after the test was scheduled, just before you started off on it, Mr. Smith's representatives from the two brotherhoods represented that he had been to the doctor two days before, and was in good shape; is that correct?

A. That's correct.

Mr. Sullivan: I have no further questions.

Redirect examination.

By Mr. Frates:

Q. Do I understand you to say, Mr. Clark, that you knew—you were of the opinion that you knew he couldn't [fol. 107] make it, and that he was physically unable to make it, and in spite of that you went out there without a doctor's authorization?

A. No, sir.

Q. Is that what you're saying, sir?

A. No, sir. If I may—

Q. Let me ask you this, sir: Why didn't you call a doctor?

A. Because he had just been released from the doctor.

Q. You didn't think that it was necessary for you to call a doctor at all?

A. No, I didn't, because he'd just—as that letter says, that he had just been up for a general checkup three days prior to this test.

Q. But from your observation he was physically unable to make that walk.

A. No, not to make the walk. From my observation I didn't think he could go back a sufficient distance to perform the duties of a flagman in the time that a flagman should be able to go back.

Q. Was there any set time?

A. There was no set time, no, sir.

Q. In other words, this is all your idea?
A. Well, it's a hypothetical case.
Q. That's right, for Bert Smith; is that right?
A. That's correct.
[fol. 108] Q. And for Bert Smith and nobody else on the railroad.
A. In this particular case, yes, sir.
Q. Thank you, Mr. Clark.

Rerecross examination.

By Mr. Sullivan:

Q. Mr. Clark, I think you said earlier that Bert Smith during this test, covered a distance of 3,000 feet or so?
A. Yes.
Q. How long did it take him to walk the 3,000 feet?
A. A little over 32 minutes.
Q. Thank you, sir.

The Court: Any further questions?
Mr. Frates: No.

(Witness excused.)

Mr. Frates: Your Honor, Dr. Lockwood wants to catch that 12 o'clock train. We just have a few questions.

Thereupon—

V. A. Lockwood, M.D., was called as a witness in behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Frates:

Q. Dr. Lockwood, I know you're trying to catch a 12 o'clock train, so we'll just ask you a few questions. You're [fol. 109] the chief surgeon of the Florida East Coast Railroad, are you not, sir?
A. That's right.

Q. And as chief surgeon do you work with the legal department of the Florida East Coast Railroad?

A. I do.

Q. You also are director of the hospital at St. Augustine, are you not, which is at the present time a hospital of the employees?

A. That's right.

Q. And they contribute to—

A. When you say "director" I'm chief surgeon. We have a board of directors. That's not my official title, but I'm chief surgeon also, which is managed by the employees through their elected representatives.

Q. You sort of have a dual capacity. You're also chief surgeon for the railroad, and work in that capacity with their legal department?

A. That's right.

Q. Now, Doctor, when a man is sent to your hospital either for illness or injury, do you determine whether or not he is able to go back to work—you or members of your staff?

A. I do; we do.

Q. And do you have a specific form for that?

A. That's right.

[fol. 110] Q. And do you have one of those forms with you, sir?

A. No, sir.

Q. Could you tell the jury a little bit about the form, just the content of it and—

A. Yes, sir. That is a small, yellow slip of paper, perhaps 3 x 5 inches, and entitled, "Local Surgeon's Permission to Return to Work," and it probably says—a space for the name; for example, John Doe; and his position: Switchman. Perhaps, "Has recovered sufficiently from his . . ." and it has a space to mark in, "Illness" or "Injury"—that he may resume work on such-and-such date, and then a signature—space for the signature of the doctor.

Q. Dr. Lockwood, can you tell the jury approximately how long you have been following that procedure as chief surgeon of the railroad, issuing these return-to-work slips?

A. Probably since 1930.

Q. 1930; about 27 years.

A. That's right.

Q. And are the men under your justification or on your staff in the various areas, such as in Miami, authorized to give those return-to-work slips, too?

A. They are; perhaps in some cases I may write the department head that a particular employee should not be returned to duty without this specific authorization of the chief surgeon.

[fol. 111] Q. In other words, that's been your function as chief surgeon of the medical department of the railroad?

A. That's right.

Q. Dr. Lockwood, how long have you been working in and around, or with railroad men?

A. I started the first of—about the first of January, 1930.

Q. Now, you live in St. Augustine, do you not, sir?

A. That's right.

Q. And that's where your hospital is, and that's the headquarters of the Florida East Coast Railway.

A. That's right.

Q. And they have one of their large round-houses there [illegible]t we used to call a round-house, there?

A. Yes, they have the Miller shops there.

Q. And many of the employees work in that general area?

A. They have the general offices; that's right.

Q. I don't know whether you've worked on the railroad; have you, sir?

A. Well, I worked on the D & H one summer after my first year of college. I worked as a freight house laborer one year.

Q. Would you say that you are generally familiar with the various duties that the average trainman, engineer, [fol. 112] and so forth—not necessarily the technical aspect, but the general type of work they do?

A. I think I have a fair idea of the general type of work, but I don't know a lot of the specific duties.

Q. Yes, sir. I have no further questions.

Cross examination.

By Mr. Sullivan:

Q. Dr. Lockwood, you said you were chief surgeon for the railroad, and also chief surgeon for the hospital association?

A. That's right.

Q. The hospital association is an organization of railroad employees who make certain contributions to the hospital and the medical staff in St. Augustine; is that right, sir?

A. Yes; the hospital is financially operated through certain sources of income, and in the case of non-operating employees such as clerks and mechanical workers, the sum of $6.80 is paid by the railroad company as a contribution, and the remainder of $1.20 to constitute an $8 monthly contribution, is made by the employee.

In the case of operating employees, such as locomotive engineers, firemen, conductors, trainmen and switchmen, they make a direct contribution of $8 to the association.

Q. And, Dr. Lockwood, are there also other doctors up [fol. 113] and down the line who work with the hospital association?

A. Yes, we have local surgeons practically in each town.

Q. Those doctors are in private practice, but are affiliated with the association; is that it?

A. They are. They're paid a fee for the work that they do. They're not paid a salary—any of the ones outside of St. Augustine.

Q. And the various employees can choose these doctors in connection with any injury or illness that they may have?

A. Whichsoever he desires.

Q. You don't tell him which doctor to go to.

A. No.

Q. Dr. Lockwood, in examining various railroad employees over the years, have you heard of field tests being made? Are you familiar with the phrase "field tests"?

A. Yes.

Q. And in your experience has it been the practice to give various employees field tests?

A. Occasionally.

Q. And from time to time have you also worked with supervisors of these various employees in determining their ability to perform various functions?

A. That's right.

[fol. 114] Q. So that you check these men over in a medical way, but you don't determine whether an engineer is qualified to run a train, for example—

A. That's right.

Q. —Or when a conductor can do the paper work or collect the tickets or handle that particular job.

A. That's right.

Q. Dr. Lockwood, was Mr. Bert Smith in your hospital in St. Augustine in May and June of last year?

Mr. Frates: Your Honor, if he wants to make him his witness, I have no objection to it at this time. However, I haven't gone into any of the treatment of Bert Smith. One reason is to conserve time, but I have no objection if he wants to, but as his witness and not as ours.

Mr. Sullivan: That's agreeable to me, your Honor.

The Court: I'll note he becomes a defense witness at this stage. Go ahead.

By Mr. Sullivan:

Q. Doctor, do you recall if Mr. Bert Smith was in the East Coast Hospital in St. Augustine, I think, in May and June of last year?

A. He was treated in the East Coast Hospital from May 21, 1956, until June 30, 1956.

Mr. Frates: Your Honor, may I make a request that I be permitted to ask a couple of questions on cross examination or redirect of what Mr. Sullivan asked before he makes him his witness to get into the medical phase of it?

[fol. 115] The Court: All right. I think that's reasonable. Let's go ahead and complete that part, and then we'll go into the medical part of it then.

By Mr. Frates:

Q. Dr. Lockwood, you say that there have been on occasions, field tests given the men and did I understand you

to say that you worked with the railroad men—the operational department in the giving of those tests, or with the supervisors?

A. I have advised; I haven't been directly on the field in such tests.

Q. But you as a medical man, were aware of them and either approved or disapproved them, or worked with the actual operation department in giving them, did you not?

A. Well, as a rule, the tests were made at my own request.

Q. At your request?

A. That's right.

Q. And you were doing that as your duty as chief surgeon?

A. That's right.

Q. Now, Dr. Lockwood, I'd like to ask you if you will tell the jury, if you know, in your 30 years' experience, where a trainman was ever taken out and made to walk a mile down the track.

A. No, I don't know of such test having been performed [fol. 116] before.

Q. To your knowledge, there has never been such a test made?

A. That's right.

Mr. Frates: Thank you, Doctor.

By Mr. Sullivan:

Q. Dr. Lockwood, we were discussing when Mr. Bert Smith was in the hospital in St. Augustine. That was May 21 through the end of June?

A. May 21, 1956, to June 30, 1956.

Q. And what was he treated there for, do you know, sir?

A. He was treated there for arthritis, for a bladder infection and for a fungus infection of the feet.

Q. When he left the hospital was he allowed to return to work, or was there some period in the meantime where he was under care of some other doctor?

A. I'm quite sure that he did not return to work at

that time, and he was examined again at the East Coast Hospital in my office on September 10, 1956. And at that time he had returned to work on August 16, 1956, and as I recall, his permission to return to work had been given by Dr. Nash, who is a local surgeon in Miami.

Q. You said you examined him on September 10 in the hospital in St. Augustine?

A. That's right.

[fol. 117] Q. Did you call him up there for examination, sir?

A. No, I think he came of his own volition.

Q. Did he tell you why he wanted to be examined?

A. Well, one thing is this—I think he wanted a general examination. I'll read my letter in that respect. Another thing is, he wanted the statement for an insurance policy. I've written down here in my office record under date of September 10, 1956, "Age 61. (1) Has never felt better. Takes empirin compound and gout tablets. Empirin with codeine, occasionally." That was for his joints. (2) "His weight was 262; he had reduced from 327. (3) He wanted some alophen pills (which are a laxative). (4) He still had epidermophytosis of his feet (which is a fungus). (5) He wanted the statement so he could take out an insurance policy. His blood pressure was 210 over 116. I found his heart sounds, good tone; his urine was essentially negative. His hemoglobin and white blood count were all right, and he told me at that time that he was getting a shot of ACTH every fifth day, which was for the arthritic condition."

Q. Doctor, you say at that time on September the 10th Bert Smith told you he wanted this examination for an insurance policy?

A. Well, I don't know as that was the whole purpose of the examination, but he asked for a statement so that he could take out an insurance policy, and he told me that the [fol. 118] agent had told him that if he could get a clear bill of health from me, that he would be provided with such a policy.

Q. Did he say anything to you, sir, about taking a field test at that time?

A. No.

Q. When you gave him the statement did he have any comment to make about the statement?

A. Well, he accepted the statement. I think he would have—I think in that statement, as I recall it, that I stated that he had improved in regard to his arthritis; that his heart sounds were good; that he had arterial hypertension, and possibly I stated that he was overweight.

I recall that he asked me again, and told me that if—that his agent had told him that he would give him a policy if he had a clean bill of health, but I felt that that was the best statement—I mean, the only true statement that we could give him.

Q. Now, Doctor, his statements to you that he felt fine—excuse me; can you tell me, first, sir, whether or not that was his statement to you that he felt fine at that time?

A. The first thing he said—I have the record here—he never felt better. Of course, he did take empirin compound, which is for pain. He took gout tablets which had helped his arthritis, and he took empirin with codeine occasionally.

Of course, that was for pain, and then he was getting [fol. 119] an injection of ACTH every fifth day, and this would indicate to me that he had had a good response in regard to the relief of pain from his arthritis, which affected, particularly, the left knee.

Q. Had he been treated for the arthritis of the knee when he was in the hospital, Doctor?

A. Yes.

Q. And in determining whether or not you would let him go back to work, to what extent do you depend on his statements to you and his desire to go back to work, in determining whether or not you will let him?

A. A great deal. If he told me that he still had pain in his knee, and so forth, I would have recommended to him that he remain off duty until he felt able to do his work.

Q. When you saw him on September 10, Doctor, did you observe him walk or make any tests or examination in the hospital as to Mr. Smith's ability to walk?

A. Yes, I had him walk up and down the hall, and he,

I thought, walked quite well. Of course, Mr. Smith doesn't walk as vigorously as a young man or a man that's of a slender build. I don't think I do, myself. But I thought that he was doing pretty well.

Q. Doctor, your examination was all in the hospital, I understand.

A. That's right. He was an outpatient, but I mean, my [fol. 120] office is in the hospital. He was examined as an outpatient on the 10th of September, 1956.

Q. In your opinion, sir, would your examination in the hospital, or a test in the field, have been more comprehensive to determine his abilities to work as a flagman?

Mr. Frates: Your Honor, I object to that. The doctor has testified that he gave him an examination, and that he received a slip authorizing him to return to work, and I don't think that that can be modified now.

The Court: Sustain it.

By Mr. Sullivan:

Q. Dr. Lockwood, have you seen Mr. Smith since September 10, I mean, to examine him from a medical point of view?

A. I saw him on January 5, 1955—no, I saw him on January 7, 1957.

Q. Will you tell us what notes or comments you had of your examination at that time?

A. At that time he came up bearing a note which was dated January 5 from Dr. Midkiff, who is one of our local surgeons in Miami, and that note read, "I am referring Bert Smith to you for evaluation of his knee. He has been under my care for two different periods for obesity; once in 1947 and again for the past two month. In addition to the obesity problem, he has had arthritis mostly in the joints of the lower extremities. I feel that weight reduction would be of [fol. 121] great value for this, and, therefore, have attempted once more to reduce him. His weight on the 22nd of November, 1956, when I began with him was 274 and a quarter pounds. He has been on Meticorten and analgesics, as well as ACTHar Gel, parenterally" (which means hypodermics) "because of edema . . ." and 'adema' means swell-

ing of the tissues) "and marked pain, especially of the left knee."

Now, my note on January 7, 1957, reads as follows: "Age 62. Feels quite well, except for some soreness, left knee. Fell on it 13th of September. Knee has improved considerably. Says that this knee had been getting along well before the injury, and that it would have been entirely well in a few weeks if he had not been injured. Referred by Dr. Midkiff."

"Blood pressure"—I took it three times. It was "190/96; 172/96; 176/96. Very obese, but has reduced. Weight, 257 lbs. Upper and lower plates; keeps false teeth clicking continually. Tonsils present. Neck okay. No basal rales. Heart sounds regular, good tone. Abdomen obese. Extremities: Mottling of skin, region of knee, due to application of heat. No swelling. No tenderness. Motion good and as full as in the left one." That should read "in the right one." I've made a mistake there, but I meant that the motion was as good and as full in the one knee as in the other. "Walks and stamps foot vigorously and says he can walk well, and has no pain while walking. Walks with slight limp, [fol. 122] which may be habitual. Rectal examination normal; prostate okay." I have a note which says, "Rx Dr. Midkiff for urine," which means he was taking a prescription from Dr. Midkiff for a bladder complaint, but has no urinary symptons. "Had nocturia two times." That means he gets up at night twice to empty his bladder. "Now has nocturia one time. Walks length of hall well, and not short of breath. Heart sounds good after exercise. Has reduced from 327 in May, to 257 now. Wants to work on baggage car when he feels able to do so. Opinion: No evidence of any aggravation of heart condition following injury. Left knee appears in as good a condition as it was prior to the injury. Will return to care of Dr. Midkiff. Urine, as recorded. The analysis was negative, except that he had some pus cells in the urine, and the X-ray of his knee was reported by Dr. T. D. Rankin taken on the 7th of January, 1957, in comparison with previous films, shows the patient still has prominent lipping of all articular surfaces," which means the type of arthritic changes in the knee.

Q. Dr. Lockwood, when you saw Mr. Smith in January,

do I understand you again had him walk up and down the hall in the hospital?

A. That's right.

Q. How did his ability to walk on that occasion compare with his ability to walk when you had seen him on September 10?

A. I think he walked very well in January.

[fol. 123] Q. Was he using a cane at that time, sir?

A. No.

Q. Dr. Lockwood—

A. At least, when I had him walking, he wasn't using a cane. I can't recall whether he was carrying a cane or not, but I know I had him walking and he walked very well and—he had a limp, but I can't state whether he had more limp than he usually does. He has some disturbance in his gait, anyway.

Q. Dr. Lockwood, we didn't go into your medical background earlier. You are a medical doctor, sir?

A. That's right.

Q. And generally, you do general surgery?

Mr. Frates: I will stipulate he's an outstanding doctor.

Mr. Sullivan: Thank you, sir. No further questions.

(Witness excused.)

Thereupon—

C. Russell Morgan, M.D., was called as a witness in behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Frates:

Q. Will you state your name, please?

A. Dr. C. Russell Morgan.

[fol. 124] Q. Dr. Morgan, you are a licensed physician in the State of Florida?

A. I am.

Q. Where is your office located?

A. 1150 Southwest 1st Street.

Q. Can you tell the jury, briefly, your medical training?

A. I received my medical degree at the University of Louisville in Kentucky in 1937. And following that, had four years of resident training at Jackson Memorial Hospital, completing both the surgical residency and the medical residency. I've been on the staff at Jackson Memorial ever since that time, and first on the obstetrical staff and on the surgical staff, and for the last 13 years on the orthopedic surgical staff.

Q. Doctor, do you specialize in any particular field, or is part of your work done in any particular field?

A. I do general surgery, with an especial interest in orthopedic surgery.

Q. And what is orthopedic surgery, sir?

A. Bone and joint surgery.

Q. In other words, we're dealing, of course, in this case with arthritis in the knee joints, and things of that nature. Is that in your field?

A. That's correct.

[fol. 125] Q. Doctor, can you tell us what societies or organizations that you belong to—medical societies, of course.

A. The Dade County Medical Society, the Southern Surgical, Southern Medical, the AMA—there are several others. The names escape me at this minute.

Q. Are you a member of the Florida East Coast Hospital staff? I'm sorry—not the hospital staff—the medical staff, I guess would be the more appropriate term.

A. I'm not sure that that term is correct. I'm a local surgeon employed by them, not on any salary, but depending on the work done.

Q. How long have you been a local surgeon for the Florida East Coast Railroad?

A. Since 1941.

Q. Dr. Lockwood, who was here, is the chief surgeon and you report directly to him; is that right?

A. That's correct; I do.

Q. In your duties as local surgeon you treat the employees of the railroad here?

A. I do.

Q. Who are sent to you, or who come to you of their volition, sir?

A. I do.

Q. And you have been employed or a member of their staff since 1941?

[fol. 126] A. Yes, sir.

Q. Of their local staff. Doctor, did Bert Smith, the plaintiff in this case, come to you after September the 13th, 1956, for an examination or for treatment?

A. As to the date, may I refer to the record?

Q. Yes, you may use your record, sir, if you wish.

A. Do you mean at any time since then, or were you referring to that particular date?

Q. The first date. No, after September the 13th, 1956.

A. I have seen him, yes, since then.

Q. When was the first time that you saw him?

A. Since that date?

Q. Yes.

A. The first time I saw him since that date was May 1, 1957.

Q. Now, have you treated him since the first time you saw him, or did you examine him at that time?

A. Yes, I have treated him since then.

Q. Now, prior to September the 13th—and, of course, Doctor, as you know, that's the date of the accident which we're involved here in this case—had you seen Bert Smith in a medical capacity?

A. Yes, I had seen him prior to that.

Q. Now, will you tell us if you made an examination when [fol. 127] you saw him in May of '57, and what that examination disclosed?

A. He had an injury to his left knee, from the history, sustained in a fall. The exact date I did not know.

Q. I think there's no question—I'm sure that Mr. Sullivan agrees.

A. There was also arthritis of the knee, and a possible torn semilunar cartilage of the left knee.

Q. Doctor, did he relate to you the history of this accident?

A. Yes, I believe he did.

Q. Did he relate it to you briefly, that he was walking down the tracks in a field test and—

A. That's right.

Q. All right, sir. Now, did you make an examination of him?

A. To determine the diagnosis, yes.

Q. And what did your examination consist of, Doctor?

A. Of examining it clinically, only. I did not make films of the joint that had been done during the intervening time, several times, I was told, from the history. And so I did not repeat all that.

Q. Doctor, what is arthritis?

A. Arthritis is an inflammatory process occurring in a joint space.

[fol. 128] Q. What causes it, if anything?

A. There are several causes to it. Sometimes it's due to infection; sometimes it's due to trauma or injury; sometimes it is a metabolic disease. By that, I mean it occurs from growth changes within the body. The latter is the type we see in quite elderly people in which no infection has been associated.

Q. Doctor, is the arthritis that Bert Smith has at the present time in his left knee, in the advanced state?

A. Yes, it is.

Q. Do you have an opinion as to his capacity to work on a railroad in the occupation as a trainman or flagman at the present time?

A. I don't think that he can work in any capacity that requires him to be on his feet at this time.

Q. Now, in your opinion, is that a recent development?

A. Yes. He's had considerable difficulty, but apparently—well, he was able to carry out his duties, because he did.

But recently it's impossible. I know he can't.

Q. In other words, at the present time you'd feel that he is totally disabled to work?

A. Yes.

Q. As a railroad man, and you feel that's of recent origin?

[fol. 129] A. It depends on your term "recent"—how recent you mean.

Q. Well, how recent do you mean, sir?

A. Well, I would say that I know from personal knowledge that since I saw him on May 21 of this year it would have been impossible for him to work. I could only speculate

as to how much further back before that the actual time went.

Q. Does the history relate that prior to September of '56, the date of the accident or the fall, that he was working as a flagman?

A. Yes.

Q. And you knew from treating him that that had been his job for many years?

A. I had seen him while he was at work.

Q. Has Bert Smith always been a fellow that's been rather heavy?

A. Ever since I've known him, yes.

Q. About the same general build that he is at the present time?

A. Yes.

Q. Now, Doctor, we're confronted with this problem and I'd like you to give the jury your opinion as to what effect these falls—and I think the evidence in this case shows that he fell two or three times and injured his left knee—in your opinion, what effect did this fall have on Bert Smith's [fol. 130] arthritis, if anything?

Mr. Sullivan: Your Honor, just a minute. I think—I will concede on the one hand, that Dr. Morgan is eminently qualified in the field of orthopedics, but I think there ought to be further questions as to whether he saw Bert Smith shortly before this accident and examined him medically, so he can correlate the two. I object to the question without further—

The Court: I will permit you to cross examine him on that question, and I'll overrule the objection.

By Mr. Frates:

Q. Doctor, would you read that?

A. Falls on the knee would cause considerable aggravation. The exact degree of it would depend upon the seriousness of the fall and how much trauma occurred. Of course, repeated falls would be ordinarily expected to be worse than one fall.

Q. Doctor, when you use the term "aggravated" I think we're generally familiar with it, but medically, what do you

mean? In other words, he had the arthritis in his knee; is that right?

A. He had the arthritis in the knee prior to his fall. However, I would mean that the condition would be aggravated and made worse, definitely increased in severity.

Q. Is that what you said, trauma or a blow or an injury to that arthritis causes it to become worse?

A. Yes.

[fol. 131] Q. Or aggravated it. Can you tell the jury how that happens, Doctor? What takes place in the leg that causes it to get worse?

A. When arthritis is present in a joint, over a long period of time—there is destruction of the thin layer of cartilage that lines the bone in all joints. When that cartilage is destroyed it permits direct contact between the bone on one side and a bone on the other side of the joint. This causes pain. It also causes a roughness of action, in which there is not a smooth lubricated action, and the pain causes spasm. And if the spasm is continued long enough, there will be a complete stiffness and loss of motion in the joint.

When loss of motion has finally occurred, and the bone grows straight across the joint, then, of course, all the pain disappears but the use of the joint has also disappeared and they no longer can use it.

We see such people on the streets walking with a completely straight and stiff leg. They no longer have pain but they've suffered quite a bit to reach that point. We call that ankylosis, and that means a complete stiffening of the involved joint.

Q. Doctor, at the present time do you find that the condition in his left leg is worse than the condition in the right leg?

A. Yes, sir; it is.

[fol. 132] Q. And that's consistent with your opinion where the history shows that he fell on these two or three occasions on this particular test and injured his left knee. Would that be consistent with what you find now?

A. It would be consistent with it. I can't state that it definitely came from that.

Q. But from the history that you have related, in your

opinion do you feel that it came from that, or was aggravated, rather, by that fall?

A. It could, yes.

Q. Doctor, can you tell us again, in determining in dollars and cents, what effect these two or three falls had on Mr. Smith's occupational ability to work? You, of course, are familiar with roadbeds, are you not, sir—the ballasts and things of that nature that are around the roadbeds of railroad trains?

A. Yes, but I don't understand the first part of the question when you asked for dollars and cents evaluation.

Q. I'm not asking you that, but I'm trying to determine that for the jury to determine. I'm trying to find out if you have an opinion as to what effect you feel that this fall had in hastening or bringing about Smith's condition that he has at the present time.

A. Well, his present condition is that he can not work at all. In my opinion he will never work again. I don't [fol. 133] know exactly how many more years of active work he had before him if there had been no injury before the arthritis, which he already had, would have prevented further work. I can't say exactly how much time he still would have been able to put in, but certainly, some.

Q. Can you give us an approximation, Doctor—the best approximation that you can, of how many years you think that he might have been able to work but for this injury?

Mr. Sullivan: Your Honor, I'd like to object to the question on the same grounds as before, that Dr. Morgan was not treating Mr. Smith just before this happened. He hasn't seen him until some six or seven months afterwards. I don't think without a closer examination of him he's qualified at this time to testify about his condition seven months before when he hasn't seen him.

Mr. Frates: Your Honor, I personally feel that the doctor is—he has seen Smith before, but I think that's a matter of cross examination and it goes to the weight and the credibility.

The Court: I will overrule the last objection.

Mr. Frates: Would you read it back, please?

(The pending question was read by the Reporter as above recorded.)

Mr. Sullivan: I object, your Honor.

The Court: Overrule it. Note it in the record.

[fol. 134] The Witness: In my opinion, the patient would probably have been able to work—and this is a statement of course—about three more years. It might have been a little more or a little less.

Mr. Frates: No further questions. Thank you, Doctor.

Cross examination.

By Mr. Sullivan:

Q. Dr. Morgan, you are in private practice here in Miami, sir?

A. Yes.

Q. And you do not confine your work to patients who come to you through this East Coast Hospital Association?

A. Not at all.

Q. And such of those patients as do come choose you as their own doctor. They are not assigned as patients.

A. That's right. It's their election.

Q. Did you get a history from Bert Smith that he had been treated by Dr. Nash?

A. I did.

Q. Immediately prior to this injury in September?

A. I don't recall that it was—I know that he had been seen by Dr. Nash after the injury, but I don't recall that he told me who was treating him immediately before.

Several of the company men had treated him for various conditions prior to the accident, I, being merely one of [fol. 135] them.

Q. Did you also get a history that Drs. Midkiff and Manson had seen him afterwards?

A. Yes, I did.

Q. And that they had treated him for arthritis and for being overweight?

A. That's right.

Q. Have you had a chance, Doctor, to examine any of the X-rays that were taken immediately afterwards?

A. No, I haven't seen any films made since the accident.

Q. When I say "immediately afterwards" I mean right after this injury Bert Smith had.

A. No, I did not.

Q. Had he been a patient of yours prior to that time?

A. Prior to the accident?

Q. Yes.

A. Yes.

Q. Over what period of time had you treated him? When did you first treat him, sir?

A. I first treated him in October of 1953.

Q. When, after that, had you treated him?

A. On through '53, and the last time I saw him prior to the accident was May 19, '54.

[fol. 136] Q. So that you had seen him in May of '54, and then there were approximately three years until you—

A. There was an interval until May 1, '57, before I saw him again.

Q. Just a little less than three years.

A. That's right.

Q. And did Mr. Smith also give you a history of having gone to the hospital in St. Augustine to be treated for arthritis and overweight?

A. He may have. I don't have it recorded, and I don't happen to recall that point.

Q. Did he give you any history of being treated by Dr. Manson in March and April of last year?

A. He did, yes.

Q. For his left knee for arthritis?

A. Yes.

Q. Did he give you any history of losing time from work because of his complaints about his knee prior to this accident?

A. No, I didn't hear about—I know there had been some lost time because of the history of the injury itself. There was some decision to be made, I understand, as to whether or not he was yet able to return to work. But that's only speculation. The exact idea of how much time he lost, I do not know.

Q. Dr. Morgan, about how tall is Mr. Smith?

[fol. 137] A. He is about, I'd say, five-three.

Q. And have you made any notation as to his weight recently, sir?

A. Yes, I have recorded here fairly recent weight, I'm

sure. His weight on May 1, '57, was 256 and a half. I can bring that on up closer to date. On May 21 it was 261 and three quarters. On June 10 it was 263 and a quarter. That is the most recent weight—no, the most recent weight is June 26 when it was 263.

Q. Considering Mr. Smith's size, could you consider him overweight at the present time?

A. Yes; considerably.

Q. Does the fact that he's overweight and has been for some time, have an effect on this arthritic condition in his knee?

A. Yes, it makes it considerably worse because he is bearing more weight on the diseased bone surfaces than he would if he were lighter.

Q. And would that overweight problem that he's had for some time also cause the arthritis in his knee to advance more rapidly than it would in a lighter weight—

A. Yes, it would.

Q. So that would it be accurate to say this: That as the arthritis advanced, the more Mr. Smith was on his feet even prior to the accident, the more it would cause the [fol. 138] arthritis to continue and progress?

A. Yes, that's true.

Q. The best thing to do to arrest it—and this is true now and it's true before he had this fall—was to stay off his feet as much as possible?

A. Correct.

Q. Did Mr. Smith give you—tell you that he fell once or twice or three times? Can you recall that, sir?

A. I don't think he mentioned how many falls occurred. It was not until a moment ago that I was aware that more than one fall had occurred.

Q. Assuming, Doctor, that there had been more than one fall, can you pinpoint any aggravation to one fall and not the other?

A. Assuming that there was more than one—

Mr. Frates: I think in fairness to the doctor, that it ought to be pointed out that all the falls occurred in the same general period of time as he was walking down the track, and it wasn't a fall today and one a month from now, and then one a month later.

Mr. Sullivan: I'll amend the question.
The Court: All right. Go ahead, Mr. Sullivan.

By Mr. Sullivan:

Q. To say when Bert Smith fell on September 13, 1956, that he fell more than one time, say, two or three times, could you pinpoint the aggravation to one fall and not another fall?

[fol. 139] A. No, I don't think that would be possible, unless he were examined between falls.

Q. Now, did you, Dr. Morgan, ever observe Bert Smith performing the duties of a flagman under emergency conditions. I mean, anything more than standing by the side of a train?

Mr. Frates: Your Honor, that's not proper cross examination, and we object.
Mr. Sullivan: I think Mr. Frates brought it out on direct.
Mr. Frates: I object. I don't think it's proper.
The Court: What is your question?
Mr. Sullivan: I was going to ask Dr. Morgan if, prior to September 13, 1956, he had observed Bert Smith working as a flagman on a passenger train under emergency conditions, as compared to normal operating conditions where he would just be getting on and off the train.
The Court: I will overrule the objection.
The Witness: I have never observed Mr. Smith in his duties in any way, whether emergency or otherwise.

By Mr. Sullivan:

Q. So that, I take it, Doctor, you're not expressing an opinion at this time as to his ability to work as of last September?

A. No, I couldn't say what his condition was last September, not having seen him then.

[fol. 140] Q. As to the arthritis that Mr. Smith has, does he also have arthritis in his right knee, Doctor?

A. Yes.

Q. But it's worse in his left knee than his right?

A. It is worse now in his left than in his right.

Q. Did you have any history that it was worse in his left than in his right before he had this fall?

A. No.

Q. In evaluating him, then, Dr. Morgan, were you assuming that his left knee was comparable to his right knee before he had this fall?

A. They were equally involved at the time I last saw him before the accident. I don't know exactly how they were at the time of the accident, since more than a year had passed since my last visit then, but if they were in the same condition, they would have been about equal.

Q. You didn't get any history, then, that his left knee had bothered him more than his right knee in 1956, before he had this fall?

A. No.

Q. I'm not sure I'm expressing myself correctly, sir, but were you assuming, then, for purposes of evaluation, that his left knee had not bothered him any more than his right knee prior to this fall?

A. That's correct.

[fol. 141] Q. Now, as to Mr. Smith's arthritis, in your opinion had he not had this fall, would it have continued to progress anyway, Doctor?

A. Yes, I think it would. It was still active.

Q. Then there is really no cure for it; it was something that would go on and the best you could do is to alleviate it. Would that be correct, sir?

A. Well, that's partially correct. While it could not have been cured, it might have become inactive and a period of varying—a period of time could have occurred of inactivity in the arthritis process. I don't mean inactivity on the patient's part, although that would have helped—during which he would have been relatively symptom-free.

Those periods of inactivity, then, could start up—I mean, the activity itself could start again, either spontaneously or because of some injury such as the fall, or from some clumsy move or motion on the part of the patient.

Q. Dr. Morgan, assume if you will, that Bert Smith was treated by Dr. Manson for arthritis in his left knee, as opposed to his right knee, in March and April of 1956.

Mr. Frates: Your Honor, I object to that on the grounds it's hypothetical because we have a statement that at the time of Dr. Lockwood here, that his arthritis on September the 10th, 1956, is now under good control with the use of cortisone preparation, and that he's using facts that are not [fol. 142] in evidence in this case, and that Dr. Lockwood, the chief surgeon, has testified that as far as his arthritis is concerned, in both knees, it was all right on September 10, 1956, and that's the only evidence in this case.

Mr. Sullivan: Your Honor, we have Dr. Manson's deposition, which we intend to read. I don't want to call Dr. Morgan back again.

Mr. Frates: I don't think that you can say, "Do you know that Dr. . . . " so-and-so said this or that. If he wants to put that evidence in, all right.

The Court: Read me the last question, Miss Reporter.

(The pending question was read by the Reporter as above recorded.)

The Court: I will sustain the objection at this time.

Mr. Sullivan: Your Honor, I have no further questions of the doctor, but I'd like to proffer that one question.

Mr. Frates: I have no objection if you want to ask it later on after you read the deposition, if it's a proper question.

The Court: Do you want the doctor to remain on attendance until you read the question?

Mr. Sullivan: No, sir, I think I can ask the question now and get his answer. Perhaps the jury ought to be excused.

The Court: Mr. Frates?

[fol. 143] Mr. Frates: I have one or two questions. When we recess, perhaps he can ask it into the record.

The Court: All right. We will reserve on that question, with your right to proffer it outside the presence of the jury.

Redirect examination.

By Mr. Frates:

Q. Dr. Morgan, Mr. Sullivan asked you about private patients coming to you. Actually, as you have stated, that you're one of the local surgeons. The men in charge of the

railroad here, the Florida East Coast, send some of the men over to you for treatment, do they not, sir?

A. If the man does not request to be sent to a certain individual, and doesn't know who to go to, the man from whom he receives his slip might, I suppose, suggest the person and put it down. I don't know that that occurs, but I assume it does.

Q. In other words, you have had slips from the executives or the men in charge of the Florida East Coast, sending men to you for treatment?

A. Yes, I've even had such slips sending them, directing them to someone else, but they accidentally came on over to me instead.

Q. Have you ever had Mr. Clark send you anybody, Mr. Clark here, the trainmaster?

[fol. 144] A. I think possibly so, yes.

Q. Now, you had treated and knew Bert Smith's background and you took that all into consideration. In other words, so there's no question in the jury's mind, you're not saying that—

Mr. Sullivan: Your Honor, before Mr. Frates goes any further, I object to the question as leading and—

The Court: Don't unduly lead him, Mr. Frates.

By Mr. Frates:

Q. You took into consideration about his background when you made the statement of the three or four years that you thought this fall had exacerbated or caused his arthritis to flare up?

A. I did.

Q. Now, Doctor, is it medically consistent that a fall of this type, as related in the history, a fall on a roadbed, on ballast, would cause the arthritis to flare up or get worse?

A. It is.

Q. I mean, in other words, this is not something that you reach up and saying this is a possibility; this is medically consistent, is it not?

Mr. Sullivan: Just a minute, your Honor. I object to this leading question by Mr. Frates.

Mr. Frates: I'm trying to save a little time, Mr. Sullivan.
The Court: Sustain the objection to the last question.

[fol. 145] By Mr. Frates:

Q. Would you state, Doctor, whether or not you have an opinion as to whether a fall where a person strikes his knee on a roadbed—where that person had arthritis prior to that, would precipitate or aggravate that condition—whether such an opinion would be medically consistent?

A. Yes, the fall as described by the patient to me would seem quite likely to cause an aggravation of his previously-existing arthritis.

Q. Would you say, Doctor, that it would be very unusual if it didn't cause some aggravation to the arthritis?

Mr. Sullivan: Just a minute. Same objection, your Honor.
The Court: I will overrule that objection. Let's go ahead.

By Mr. Frates:

Q. Do you have an opinion?

A. I would say that from the fall as described by the patient, it would have been practically impossible for him not to have aggravated the arthritis.

Mr. Frates: Thank you, Doctor.

Recross examination.

By Mr. Sullivan:

Q. Dr. Morgan, having in effect, almost a three-year lapse since you had seen Mr. Bert Smith, can you say how much aggravation there was? Do you think you can express a [fol. 146] qualified opinion on that at this time?

A. No, I couldn't say exactly how much aggravation. You probably understand that from previous questions that you asked about the left knee as compared to the right knee, that very seldom do two sites of arthritis progress steadily and evenly and symmetrically at exactly the same rate.

Usually, during the course of even, say, a period of three months, while treating such a condition, the site of greatest

pain will tend to shift. I mean, it might be this week that the right knee hurts a little worse than the left, and next week that the left knee hurts worse than the right, without any external forces having anything to do with it one way or the other.

And when I answered the question that the pain and the involvement in the knees was relatively equal so far as I knew, up until the accident, I was taking an average of all that. I saw times when one knee hurt worse than the other, but the average was about equal. And we would expect that there'd be about the same amount of involvement bilaterally.

Q. In expressing your opinion, Doctor, you were simply projecting 1954 into 1956, without any personal examination of him?

A. Yes.

Q. At the present time, sir, can you say to what extent—give an opinion based on reasonable medical certainty as [fol. 147] to what extent the arthritis in that knee has progressed since September, and to what extent the complaints in the knee are due to this aggravation?

A. It's a little hard to do that, based on September, since I didn't see him until May. But I would say that at this time there is practically no cartilage left in the knee. There is very little joint space still existing, and it was on that basis that I said that he could not work now at this time, and since I know that it is not at all possible for him to regrow that cartilage, that he will not be able to work in the future. But exactly what proportion of that has occurred since the injury in September, it's impossible for me to say.

Q. And he had something that was probably going to progress, anyway, at a rate that you can't determine?

A. That's correct.

Mr. Sullivan: No further question, sir. Thank you.

Mr. Sullivan: No further questions.

The Court: Do you want to ask the question?

Mr. Sullivan: I'll withdraw the earlier one.

(Witness excused.)

Mr. Frates: Your Honor, can we hit the fusee before or after lunch?

Mr. Sullivan: Your Honor, I'd like to have Mr. Frates state what the relevance of lighting the fusee is in this case.

[fol. 148] Mr. Frates: It's very relevant, I think it's all the relevancy in the world. I'd like the jury to see what it looks like. It's obvious, the distance that you can see that fusee.

Mr. Sullivan: Your Honor, I'll object to it because I think Mr. Frates isn't talking about what happened on that day. He's now seemingly objecting to operating rules, and what the rules of the transportation department ought to be.

Mr. Frates: We're talking about the fact that this is a man doing a job satisfactorily, working out there, until they trumped up a test.

Mr. Sullivan: I move that it be stricken and the jury instructed to disregard it.

The Court: I will strike the last statement and I will note your objection to the striking of the fusee, but I will permit the jury to view it and we will go ahead with that test or matter.

We will take a break now and observe the fusee, go down together now and reconvene here at 1.30.

Gentlemen, we are going to go together down here to the tracks right to the west of the courthouse, to observe the fusee, and thereafter, from there we'll go about our business on our lunch hour and reconvene up here at 1:30.

I instruct you that you are not to discuss the case among [fol. 149] yourselves or with any other persons or parties. Mr. Clark will be there and may be asked some questions about the fusee, but unless you have a specific question, don't discuss it among yourselves. If you have a specific question you want to ask, advise the Court and I will permit you to ask it down there on the site.

When we recess for lunch, my instructions which I made to you last night are still applicable. That is, you are not to discuss the case among yourselves or with any other persons or parties. You are not to dwell on any particular portion of the testimony, as you have not yet heard all of it. Do you understand that?

Mr. Sullivan: Your Honor, I have one request to make, and that is, if a fusee is to be lit down here and the jury are

going to be right where the fusee is, I think they should be instructed to observe it but not to form any opinion as to the visibility of it if they're right on top of it.

The Court: I won't instruct them about that. I think that will be a matter of argument.

Mr. Frates: It's just common sense.

Mr. Sullivan: If we are getting into the question of how far it's visible, if you're right on top of it—

The Court: I will ask them not to make up their minds on any of the evidence until they have seen and heard it all, and then they can determine what weight or credibility they want to apply to it.

[fol. 150] (Thereupon a recess was taken until 1:30 o'clock p.m., of the same day.)

After Recess

(The trial reconvened at 1:30 o'clock p.m., pursuant to the taking of recess, and the following proceedings were had outside the presence of the jury:)

Colloquy Between Court and Counsel

Mr. Sullivan: Your Honor, I wonder if we could have the record indicate that at the noon recess, Trainmaster Clark took the fusee that was introduced in evidence down at the railroad station; lit it in the immediate presence of the jury.

The Court: I don't believe it was the one we introduced in evidence. It was the second one, one just like the one we introduced in evidence.

Mr. Sullivan: Next, your Honor, you may recall that you appointed as the Court-appointed physician Dr. Duke Baird. We found out he was in the same office as Dr. Russell.

The Court: At that time he was.

Mr. Sullivan: So that your Honor said that we could go ahead with anyone that counsel could agree on, so I wonder if we could let the record show that Dr. Holmes will be substituted for him?

The Court: In the file there were no supplemental orders, but if that's the agreement between counsel, I am glad to substitute—

[fol. 151] Mr. Sullivan: Mr. Frates wasn't stipulating, but inasmuch as—

Mr. Frates: I have no objection to Dr. Holmes being called.

The Court: All right. We will substitute Dr. Holmes in place of Dr. Baird.

Mr. Sullivan: Your Honor, as to these records, we took the position that you simply can't send out a subpoena and pull in all the records. If so, we'd want them produced. I have the complete file on Mr. Bert Smith here. We feel that there are certain reports in here that were dated after this occurrence and aren't properly reachable by subpoena; that they're reports of employees—or the work product and privilege—they can't be obtainable by subpoena.

Mr. Frates: You can't say that any file—the whole file is the work product. The only restriction would be some statements of witnesses who testified to the accident, or pictures or things of that nature. Just to take the whole file and say that's a work product—

The Court: I didn't think you meant the file itself.

Mr. Sullivan: Your Honor, occurrences that occurred before this accident never came up.

Mr. Frates: I didn't ask for his file. I asked for Clark's file.

Mr. Sullivan: That's his file on Smith. That's what [fol. 152] it amounts to. For example, your Honor, here's a letter in here—something about photographs. Here's another letter in here saying the case is coming up on the 24th. I don't think it even fits within the scope—

Mr. Frates: I don't think that's called for in the subpoena.

Mr. Sullivan: We had to come up with this entire file.

Mr. Frates: I don't think anybody took that position. There was other correspondence.

The Court: The related question that brought the letter up was the question about the letter which had been written either by Mr. Clark or to Mr. Clark before the accident happened.

Mr. Sullivan: As far as I know, we have produced all—what I would suggest, so there could be no question about it—it's all chronological and I could have your Honor go through and see if there's anything you feel we should have produced that we didn't.

Mr. Frates: It's a question of work product. I think Mr. Sullivan is trying to stretch the work product to protect all of their files. I think I have a right to look at that file. Unless there's a statement in there—if that's Bert Smith's file, certainly, we have a right to look in that file. It's his personnel file.

[fol. 153] Mr. Sullivan: First of all, that wasn't what was subpoenaed. So you have an entire file, and the question is, what do you produce? Maybe we haven't filed the records—so it's a question—

The Court: May I see the subpoena?

Mr. Frates: Yes, sir. I thought the subpoena was pretty clear.

The Court: I think that this limits it, not to the entire file, just to matters which concern to the field test. The only exceptions that I think would be generally to this subpoena, as I interpret it, would be those matters which are under the privileged group, which are reports or matters submitted through the legal counsel or through results of the statements of witnesses which were preserved for the purposes of the trial.

Mr. Sullivan: That's right, sir, and in this entire file from here forward, there are some medical reports and some correspondence about when the trial is coming off.

Mr. Frates: If that's correspondence, we have a right to look at that file, with the exceptions of those—

The Court: Does it refer to the field test? Can't you go through your file and pick out those matters which concern the so-called field test which was given to Bert Smith?

Mr. Sullivan: Your Honor, I feel I have done that already.

[fol. 154] Mr. Frates: With only two of them?

Mr. Sullivan: The letter up and the letter back. That's all there was on it.

Mr. Frates: You mean there's no letter back to them about what happened? Sure, there is.

Mr. Sullivan: I don't think they're entitled to that.

Mr. Frates: Here's the fellow that conducted the test, and now they're going to say, "Let's protect all of our records now," because there was correspondence. That's exactly what we want to know. We want to know what was going on in the railroad, and to come in and say this is a privileged communication, this circumvents the whole purpose of it.

Mr. Sullivan: Your Honor, what Mr. Frates is trying to do is to say that because this is written in the form of a letter, it isn't a witness statement as to what happened—what is precisely what it is. He isn't entitled to that, any more than he is entitled to a witness statement.

The Court: I will have to look at these letters; I can't tell. I don't think he is entitled to a witness statement, but I think he is entitled to correspondence.

It's difficult for the Court to determine what you are referring to as a statement, and what's correspondence.

Mr. Sullivan: Your Honor, here's where it starts (indicating) and goes from here to the end. I suggest your Honor look through it.

[fol. 155] The Court: Can we go ahead with another witness while I take a look at it?

Mr. Frates: Yes, sir.

The Court: Thank you. Anything further, gentlemen, before we bring the jury back in?

Mr. Sullivan: No, sir.

(Thereupon the jury returned to the courtroom, and the following proceedings were had:)

The Court: Will the record note the presence of the trial jury, and we will reconvene.

Thereupon—

P. J. Baumberger was called as a witness in behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Frates:

Q. Will you state your name, please?
A. P. J. Baumberger.

Q. Mr. Baumberger, where do you live?

A. 249 Northwest 29th Street.

Q. And what is your occupation?

A. My occupation on the railroad is conductor and trainman.

Q. How long have you been working for the Florida East Coast?

[fol. 156] A. Since December 26, 1912.

Q. 1912?

A. Yes, sir.

Q. And what have you been during that particular time, as far as the railroad is concerned? Have you been a trainman?

A. Most of the time.

Q. On the various jobs that you have had?

A. I believe most of the time would be as trainman.

Q. Trainman?

A. Yes, sir. I haven't worked as such since about 1932, I believe, or '33.

Q. Now, at the present time do you have any official position in the Union?

A. Yes, sir.

Q. And what are you at the present time, sir?

A. General Chairman of the entire Florida East Coast Railroad.

Q. General Chairman?

A. Brotherhood of Railroad Trainmen.

Q. And do you devote most of your efforts to that? In other words, you are not actively working, are you, sir, on the railroad as such?

A. I only make periodical trips on the railroad.

Q. That is to keep your seniority; is that the purpose [fol. 157] of it?

A. Not so much to keep the seniority, but to keep up with the work; keep in trim, but mostly to avoid having to take physical examinations and trainman examinations after six months.

Q. You do that when you're off for a period of six months?

A. That's right, usually within the six-month period.

Q. Now, on September the 13th, 1956, did you go with

Mr. Clark and Bert Smith and some other people for a so-called field test?

A. Yes, sir.

Q. Mr. Baumberger, we have introduced in evidence, and we want to go through it again—a letter which was given to Mr. Clark, and which he identified as the letter. Is that a copy of the letter that you wrote to him?

A. Yes, sir.

Q. And you went with the folks up to the field test; is that correct, sir?

A. Well, we all went up there, but Mr. Smith and Mr. Delk and myself were in my car.

Q. When you arrived at the scene of the accident, will you go on and tell the jury what happened up there, please, in your own words?

[fol. 158] A. After we arrived at North—

Q. Just tell the jury, Mr. Baumberger.

A. After we arrived at North Miami Beach, which is at 355 mile post, is where we parked our cars—at least, my car, and we went down to where Mr. Clark, the trainmaster, and Mr. Johnson, the road foreman of engines, was. And they said, "We're going to start from here," which was at the 355 mile post—"start walking." Do you want me to continue?

Q. Yes, sir. Now, you gave him this letter. You delivered a copy of this letter of protest to that procedure; is that right?

A. Yes, sir; that was delivered to him at—

Q. This "him" is Clark?

A. Mr. Clark, who is sitting right there (indicating). That was delivered to him at the 29th Street and the railroad, right across from the yard office.

Q. Mr. Baumberger, before we go into the actual details of the test, you've been associated in and around the Florida East Coast since 1912?

A. Yes, sir.

Q. Have you ever heard or are you aware of any tests such as was being conducted, by anybody on the Florida East Coast?

A. No, sir; I have no knowledge of it.

Q. If you will, go ahead and tell the jury.

[fol. 159] A. Of this kind of test now?

Q. Of this type of test.

A. That's right.

Q. Will you go ahead and tell the jury what happened after you got up there?

A. After Mr. Clark said, "We'll start from here," he apparently put down the time, and so did I. And Mr. Delk. And we went walking southward. Mr. Clark and Mr. Johnson headed the way. And Mr. Smith and Mr. Delk and I was walking along and were talking, and a few minutes later I said—a very short few minutes, I said to Mr. Delk, "Let's get away from Clark"—pardon me, "Smith—and not talk to him." And we walked on ahead probably only a few feet, 10 or 15 or 20 feet ahead.

And we'd been walking for some little time, and I wouldn't know exactly now how long, but it was a short distance, and we were gaining on Smith. And when we turned around to see where he was at, he fell. And we went back to him, and he was untangling some wire that he had picked up out of the weeds that was on the right of way there.

Q. Can you tell us, Mr. Baumberger, where he was walking, where you were walking, and what tracks are there, so we get some idea?

A. We have three tracks there; one would be the northbound main track, which consists of two rails. That's on [fol. 160] the east side. Then the middle track is the southbound main, which consists of two tracks. Then we have a side track which is the west side, which has two tracks, and we were walking between the southbound and the passing track, which is the west track. That's the way we started off.

Q. Now, where was Smith walking?

A. He was walking between the southbound main and the passing track.

Q. You say you went back and he had fallen, and there was some wire there?

A. Yes, sir.

Q. Was there anything—any weeds or anything of that nature, other than the wire there?

A. Oh, yes; there was weeds, as there usually are around places like that around the railroad, especially that time of year.

Q. What type of wire was it, sir?

A. The best I recall—well, I wouldn't know the gauge, but it was a wire that looked like it had been around a bale of shingles or a keg or something of that kind. I didn't pay too much attention to it. He was trying to get loose from it when we got back there.

Q. That was the first time that he had fallen?

A. Yes, sir, the first time.

Q. Did he start out again?

[fol. 161] A. Yes, when he got it loose, why, we asked him no questions then. We kept—started walking again, and we walked a considerable distance and we noticed he fell again, when he wasn't seeming to be coming close to us. At that time, though, he got up pretty quick and we didn't go back to him.

And then we started on again. And looked back occasionally, till we got down to the 156 mile post where Mr. Clark and Mr. Johnson was sitting there wiping perspiration and panting, the same as we was, from the extreme heat. And it was 9:25 when we got there, and we noticed it was 9:20 when they got there to that point. We were four minutes behind them.

Q. Then what happened after that?

A. We didn't no more than get started talking, until I looked around and Smith was down, and I said to them—I'm pretty sure it was me—"He's down again." And we waited, I thought an extremely long time, which—I was a little bit afraid a man of his physique might be having a heart attack from the heat.

So he didn't come up, and I said to them, "This thing's got to stop right now." Well, I had no authority to stop it, other than just from a humane element. I started walking back to where Smith was laying. The special agent named Bader—for the railroad—he'd come up, in the meantime, where Mr. Clark and Mr. Johnson and Mr. Delk and myself was standing. And so when I started back, Bader says, [fol. 162] "Get in my car and I'll drive you back up there." There's the Old Dixie Highway alongside the northbound main track. Part of that old road is still there, probably 40 or 50 feet from the northbound main track, and Mr. Bader

drove back up to where Smith was laying, and we went over there.

And his lips was purple. Bader, who had been a sick man himself—I said, "I believe he's having a heart attack." And he says, "It looks bad." I said, "We can't move him. Let him rest a little bit. Maybe a little more of this heat ain't going to hurt him."

So about that time, Smith said, "How much farther is it?" I says, "A considerable distance. You can't go any further. You're going to a doctor or a hospital." Mr. Bader says, "He can go in my car." Smith says, "I'll go back in the car that I come in." I turned to Mr. Bader and asked him, would he drive me up to the gas plant where my car was, and he did.

And I got my car and come back down there. By the time we got back down there, Mr. Clark, Mr. Johnson and Mr. Delk was there where Smith was, and Mr. Clark called over to me and he says, "Did you call the ambulance?" And I said, "No, I didn't call no ambulance." And we went over and Smith got up and we got him over into my car, and I drove him down to Dr. Nash, one of the railroad doctor's office, and who had been treating Mr. Smith prior to that time.

[fol. 163] We have to take employees, even passengers, to company doctors if they're immediately available. That's a regulation of the railroad.

Q. Now, Mr. Baumberger, you then took him to the doctor?

A. Yes, sir; Dr. Nash, on Southwest 1st Street at about 9th Avenue, I believe it was.

Q. Now, you say that you operated as a trainman for a number of years. Do you still ride up and down the 'road other than when you occasionally work?

A. Oh, yes; I go quite frequently. My services are required anywhere from Homestead to Jacksonville. The Superintendent's office is at New Smyrna Beach, and the Chief Operating Officer's office is at St. Augustine where we have to do business with—handle conferences.

Q. Do you also travel up and down the 'road to determine whether the men are doing the job, or things of that nature?

A. It doesn't fall upon me to see whether the men on the

crews are performing their duties properly or not, but I do watch them. And I mean observe them. I not only observe them, but when I see little things wrong out there—and a trainmaster or superintendent is on the train—I look to see if they're watching, the same as I do. That's the extent of my observations.

[fol. 164] Q. Now, have you known Bert Smith for a long time? Has he been a trainman or flagman for a long period of time?

A. Ever since he's been on the railroad.

Q. Prior to this accident when he was working, from your observation was he doing his job satisfactorily?

A. Always did, as far as I'm concerned.

Q. Has he always been heavy and having a little difficulty in walking, compared to a relatively slender person?

A. Ever since that I've known Smith, he's been a shorty, heavy-set man, waddled like a duck, if you'll pardon the expression.

Q. Was he able to perform the duties on a comparable basis with the other flagmen?

A. Oh, yes. I've even been on the crew as a brakeman with him when we was performing the same work, and also I've had him on a crew with me many times when I was running the train as a conductor.

Q. Was he able to hold up his end of the deal, as far as you were concerned?

A. Yes, sir, no complaint. Had I have had any complaint, I would have made it.

Q. Mr. Baumberger, the Florida East Coast has an automatic block signal, does it not?

A. Yes, sir, on the main line.

Q. On the main line?

[fol. 165] A. Jacksonville to Miami.

Q. And that was where Smith was working, was he not, back in September of 1956?

A. That's right.

Q. His seniority entitled him to do that.

A. Yes, sir.

Q. Now, do you know whether he was on the seniority list, any other seniority list, other than the trainman?

A. He was not.

Q. Now, what is a baggageman? Is that a trainman, too?

A. Yes, sir. We all have dual seniority.

Q. In other words, you have a trainman and then you have a flagman, and a baggageman.

A. On the railroad, we use the term "trainman" as applying to a head brakeman, train, baggagemaster, a flagman or a swing brakeman. We have what we call a swing brakeman on open freight trains.

Q. Then Smith had dual seniority as a agman and as a baggageman; is that right?

A. That's right.

Q. And, of course, your job—the job that you have or bid on, depends on your seniority; is that right?

A. That's right.

Q. To bump the fellow behind you.

[fol. 166] A. That's right. The trainmaster advertises the job for trained baggageman, one trainman or flagman, and the employee submits a written bid and if their seniority entitles them to it, they get the job.

Q. Now, was Smith high up on both of those seniority lists due to his long service?

A. Oh, yes.

Q. Now, Mr. Baumberger, can you give the jury some estimation of how far an engineer or a brakeman—I mean, a fireman in an engine cab, could see a train ahead of them if that train were stopped and—let's take the average. Let's take the daytime, an average, clear day on a straight track.

A. Well, you can see it easily five—six miles. I have in mind Villa Rica is the 321 mile post, and Hypoluxo, still on straight tract, is the 310 mile post. And you can see a train standing at either end, whichever end you're at.

Q. Of course, that would depend on the visibility, would it not?

A. Oh, yes; you asked about a clear day.

Q. On a clear day, but if it was foggy or something of that nature, that would cut down the visibility.

A. Certainly.

Q. The flagman is equipped with a flag, is he not, in addition to the torpedoes and the fusees?

A. Yes, sir; that's the rules of the railway.

[fol. 167] Q. Then in addition to that, you have the visual observation of the engineer and the fireman; is that right? They're supposed to keep a lookout all the time?

A. That's right. That's the rules of the railway, too.

Q. Can you give the jury some estimation—let's take the same clear day on a straight track—how far you could see a man of average height on the track?

A. Well, of course, that depends on your eyesight. Now, if I had my glasses off I probably wouldn't be able to see him so far. With my glasses I can see a man on a clear day maybe a mile and a half.

Q. And, of course, I assume that a flagman has a flag to wave for protection does he not?

A. I understood you was talking about an individual man.

Q. Yes, I was, but he has also a flag, does he not, to accentuate his presence?

A. That's for the purpose of flagging trains.

Q. Now, the block system works day or night, does it not?

A. Yes, sir, unless it happened to be out of order.

Q. Now, we've gone out here and demonstrated one of these fuses here. Can you tell us, on a straight track approximately—and let's state it in the daytime here—how [fol. 168] far you could see that down the track, again, on an average day and assuming that.

A. With our experience over the years, naturally, that comes within that category—we're on an engine and we see a smoke ahead of us a mile and a half, something like that—whatever your visibility is, and it has to be one of the two things. It either has to be the smoke from a fusee or the smoke from a crosstie that may be burning under the track.

Now, there's a difference in the smoke. A fusee usually curls and goes up if the wind is not blowing, and the smoke from a crosstie will kind of spread out a little bit. If that's what you're inquiring about—

Q. Now, just in the daytime itself, could you give us some idea how far you could see the flame of a fusee?

A. Oh, I think we can see the flame all right—I'd be conservative, I believe, in saying that we could see it was a fusee between—approximately half a mile.

Q. Now, let's go into the nighttime. You have large lights on the rear of all the trains, do you not?

A. Yes, sir; we have.

Q. That's one of the requirements to have the light.

A. We have markers that displays red to the rear when we're occupying the main track.

Q. Now, can you give us—and again, just taking an average night—can you give the jury some estimation of [fol. 169] how far you can see those from down the track?

A. That depends, first, upon the condition of the marker itself. Some are a little brighter than others. It might be because of the wick condition or the flame not as high as the other, but you can see them for several miles.

Q. Can you tell us how far you could see down the track—how far the engineer and the fireman would under average circumstances in the evening when the main headlight is on?

A. Oh, you can see that miles away.

Q. If you're in the cab how far could you see down that track, the lights, say, on an average night?

A. I can best describe it this way: I go back to the 310 mile post, which is straight track through to nearly Deerfield. And that's at 326 mile post at the curve north of Deerfield. So that would be 16 miles, and you can see the headlight turning either one of those curves, whichever direction you're going.

Q. Now, you have a large light in addition to the headlight on most of the units, do you not?

A. Yes, sir; most of them has that—I don't know exactly what you call it, but anyway, the Mars headlight goes like this (Indicating.) The straight headlight goes like this, straight through. "Oscillating" is what I'm trying to say. The Mars light is oscillating.

Q. Can you tell us approximately, from your experience [fol. 170] in the nighttime, how far you could see a fusee if it was put out in the rear of a train?

A. A fusee on straight track, as I have described here—you can see it from one end to the other. You can tell it's a fusee.

Q. Can you give us some distance that you could see it at nighttime?

A. Well, 11 miles—310 mile post.

Q. You're referring to—

A. I'm confining myself to one area there which is straight track, which I believe is the longest straight track we got on this end of the railroad.

Q. Mr. Baumberger, you have given us these distances. Have you observed these things on this particular area?

A. Yes, sir, hundreds and thousands of times.

Q. You've been going up and down this railroad since 1912; is that right?

A. Yes, sir; that's right.

Q. Is there any rule or regulation that would govern a field test such as was given to Bert Smith, that you're aware of?

A. None, to my knowledge.

Q. Do you have a medical department in the Florida East Coast, or on the Florida East Coast?

A. Yes, sir.

[fol. 171] Q. Who, in the course of your experience on the railroad, has been the person to determine the physical fitness of a man to perform a certain job?

A. The chief surgeon.

Q. And where is he located?

A. St. Augustine.

Q. And that's Dr. Lockwood?

A. That's right. Let me add there, if he finds an employee just up to par—

Mr. Sullivan: Your Honor, I prefer the witness not talk about Dr. Lockwood.

Mr. Frates: Yes, I think that's a proper objection.

The Court: Sustain it.

Mr. Frates: I have no further questions.

Cross examination.

By Mr. Sullivan:

Q. Mr. Baumberger, you're the general chairman of which union?

A. The Brotherhood of Railroad Trainmen, representing all trainmen and yardmen on the Florida East Coast Railroad, members and non-members, under the Railway Labor Act, which is a federal statute.

Q. There is also another union or brotherhood which both trainmen and conductors may belong to; is that right?

A. That's right; the Order of Railway Conductors and [fol. 172] Brakemen.

Q. Mr. Delk, in September last year, was general chairman of that union?

A. Yes, sir, for that organization.

Q. And each of you in behalf of your organization, was a director of the East Coast Hospital Association; is that right, sir?

A. That's right.

Q. And both of you were, in September of last year?

A. That's right.

Q. How long have you been the general chairman here, Mr. Baumberger?

A. I first become general chairman in 1919 in October, and have been continuously, except four years' break, which was from November the 22nd, 1946, to April, 1951.

Q. Now, is that pretty much a full-time job?

A. It's always a full-time job when there's work to be done. Now, I've only been on a salary since 1951. But that, as I explained a while ago to a question, I make periodical trips on the railroad and I'm also subject to emergency calls of the railroad. If they get short of men—

Q. Now, since 1951 about how many days a year do you average for the railroad, Mr. Baumberger, working as a conductor or trainman?

A. I don't recall. It varies. Last October I made one [fol. 173] day. April and May of this year I think it was six days that I worked.

Q. So it would be less than two weeks a year that you're out working as a conductor or a trainman; is that right?

A. That's right.

Q. You devote the rest of your time to this job with the union?

A. That's right, up and down the railroad, yes.

Q. And your job is essentially handling labor grievances, isn't it?

A. That's right, grievances the men have. It might be, again, an investigation, representing the employee charged, for some offense—an irregularity.

Q. You've been doing that since 1919, with the exception of the years 1946 to '51?

A. No, sir; I first went on salary in 1924, and continued on salary until 1928. After that time I worked my regular job on the railroad and done—laid off and done the committee work or grievance work as that was demanded of me by the employees.

Q. But you've been doing this grievance work most of the time since 1919, except for the years '46 to '51?

A. I'll say 50 per cent of that time, take the whole period from 1919 to 1957.

Q. Now, since 1951 can you estimate how many days a [fol. 174] year you've worked with Bert Smith, if you've worked with him at all?

A. I can't tell you, but I can tell you the last day I worked with him, or he worked with me.

Q. When was that, Mr. Baumberger?

A. May the 20th, 1955, according to my train book.

Q. That's one of these times when you were working for a couple of days to keep your seniority?

A. That's right. That was May the 20th, 1955.

Q. And the other occasions you've observed him might be when you were riding as a passenger on one of the trains?

A. That's right.

Q. Did I understand you to say it wasn't your duty to check on employees to see how they were doing their work?

A. No, but I have the faculty of doing it.

Q. Did you specifically check on Bert Smith when you were riding as a passenger?

A. Yes, sir; I particularly checked on him with his roll and rock, duck walk. Naturally, I would.

Q. You particularly checked Bert Smith as against other flagmen?

A. No, sir; I checked the others, too. There's more than just to see how they walk on a railroad. Sometimes you might find one nodding, and he's not supposed to be nodding. [fol. 175] Sometimes you might find one that's reading a newspaper, which is against the rule, and I call their attention to it—tell them they're violating the rule.

Q. Excuse me, sir; are you finished?

A. Yes; I thought that's what you wanted.

Q. Have you ever seen Bert Smith go back since 1951 under an emergency condition?

A. I don't recall I've seen any emergency since 1951.

Q. Now, Bert Smith called you, did he not, in connection with this field test?

A. Yes, sir; he did.

Q. Do you remember when it was?

A. When was it? The day he got the letter from Mr. Clark, which I believe, is dated September the 10th.

Q. Have you had any conversation with him about the field test before that date?

A. I don't recall that I did, because there were no instructions out about any field test.

Q. He never mentioned that Mr. Clark talked to him about it?

A. No, I don't recall that he did.

Q. Did you suggest or tell him to go to the hospital at St. Augustine and see Dr. Lockwood?

A. I most assuredly did, realizing some of the possibili- [fol. 176] ties surrounding this, and what may surround other employees—not just Bert Smith—others.

Q. So that Bert Smith called you before he went up to St. Augustine and you were the one who suggested that he go there?

A. I can tell you better—Dr. Lockwood was the last word on this railroad, as to physical conditions and fitness. And that he had been in the hospital up there, and Dr. Lockwood had treated him, and I thought he'd better go up there and get Dr. Lockwood—get a check, and I said to Bert Smith—and he can't deny it—"Now, let's be frank about it. If your physical condition or mind does not warrant you or justify you going out there working, we can't do nothing about it."

Q. So it was at your suggestion just before the test came off that he went up to see Dr. Lockwood?

A. I don't know whether it was my suggestion or not. It might have been his own ideas; I don't know, but I'm just telling you what I suggested to him.

Q. Did you suggest to him, Mr. Baumberger, that he tell Dr. Lockwood he was applying for insurance at that time?

A. No, sir; I didn't even know he was applying for insurance. He said he had wanted to see Dr. Lockwood about some insurance matters.

Q. Bert said that to you, or did you send him up in connection with this test which was the—

[fol. 177] A. No, he said he wanted to see Dr. Lockwood, or that he was going about some insurance matters, papers or something. I didn't pay much attention to that because I wasn't interested in that end of it.

All I wanted him to do was to go up there and have that examination—what I'd do; what I'd suggest to you or anybody else.

Q. Mr. Baumberger, when Bert Smith came back from St. Augustine, I assume he gave you the information from which you drew up that letter you gave to Mr. Clark; is that right?

A. He told me what Dr. Lockwood said.

Q. You got your information in that letter from Mr. Smith?

A. He's the only man I got the information from; yes, sir.

Q. Bert Smith represented to you, and you represented to Mr. Clark, Dr. Lockwood said he was in fit condition?

A. That's what he said.

Q. That's what Mr. Smith said to you?

A. I know Dr. Lockwood well enough to know he would have never let him go to work, either.

Q. You got that information from Mr. Smith?

A. Yes. Knowing Dr. Lockwood as I do, if he didn't think Bert Smith was able to carry on his job, he certainly would have stopped me or anybody else. We all know that.

[fol. 178] Q. Now, when the test came off, Mr. Baumberger, you and Mr. Delk both were there as representatives for Bert Smith.

A. Yes, at his choice. He asked that we be there. He belongs to both organizations, I understand.

Q. You met Mr. Clark at 29th Street.

A. Yes, sir.

Q. Did he tell you at that time what this test was to be?

A. No, sir.

Q. Did he tell you at any time before it started, what the test was to be?

A. No, sir.

Q. Were you with Mr. Delk all the time?

A. Not all the time, no, sir. Mr. Delk was over there and when I got there, Bert Smith was over there, too. And I seen Mr. Clark and I seen Mr. Johnson.

Q. Mr. Baumberger, didn't Mr. Clark tell you this test was to be a walking test to see if Bert Smith could walk a certain distance?

A. No, sir; he did not. I, naturally, assumed that's what it was going to be.

Q. Did he say anything to you at all about it's being a walking test?

A. No, sir; he did not. But that's the only kind of test [fol.179] it could be, but I don't think he's a doctor.

Q. Mr. Baumberger, do you remember when we took your testimony before trial—took your deposition?

A. Yes, sir; I remember when we give it. You mean when I gave it?

Q. That's right.

A. Yes, sir.

Q. And you were under oath before a court reporter?

A. Yes, sir.

Q. Do you remember my asking you these questions, and do you remember giving these answers:

"Q. Did you know what you were supposed to do? Did you know what this test was at that time?"

"A. No, other than he says he's going to make the test on walking that territory, and he didn't say how far he was going to walk or anything of that kind."

"Q. Did he say it was to be a walking test?"

"A. Yes, that's what he said."

Do you remember that testimony?

A. You're talking about 29th Street conversation, and I was at that time talking about conversation taking place at the 355 mile post.

Q. Where was it that you were told this was to be a walking test?

[fol. 180] A. At the 355 mile post. When we handed this letter to Mr. Clark, Mr. Clark read it, walked over to the yard office across 29th Street, and in a few minutes come back and says, "Well, we're going to put the test on." Knowing that that's the only kind of test they could possible

be put on—then they told us where he was going: North Miami Beach.

Q. You mean that's the only kind of test he'd give a flagman? Is that right?

A. That's the only one that I understand that the trainmaster under those kind of circumstances, would be able to give him.

Q. Mr. Clark and Mr. Johnson and Mr. Delk, you and Mr. Smith all started walking?

A. That's right.

Q. You were walking from mile post 355 to 356?

A. When we started, I didn't know how far they were going, but it wound up at 356 mile post.

Q. You weren't told where it was to start or where it was to end?

A. I didn't know how far it was going—maybe to Miami; I didn't know.

Q. Did you all start off together or did some of you start off walking ahead of the others?

A. No, Mr. Clark says, "We'll start now," and we started off and he apparently looked at his watch. That's what [fol. 181] prompted me to look at my watch. I put the time down. It was 9:02.

Q. Now, Mr. Clark and Mr. Johnson were walking ahead?

A. Yes, sir.

Q. And you and Mr. Delk and Mr. Smith were all together?

A. Started off that way, yes, sir.

Q. And you got a little bit ahead of Mr. Smith?

A. That's right. We pulled away from him.

Q. Did he seem to be having any difficulty in walking at that time?

A. No, sir, no more than—as I said, a duck—

Q. I think you called it a duck waddle.

A. Yes.

Q. How far did you get ahead of him?

A. Well, when we wound up—I didn't measure the distance from where Mr. Clark and Mr. Johnson was, back to where Smith had fell last. But I'd judge it was around 1500 feet from—maybe 2000. I was more interested in getting the man to the doctor then. I knew something had happened when he didn't get up.

Q. Mr. Baumberger, when you say that Bert Smith fell the first time, how far ahead of him were you then?

A. Oh, I'd have to hazard a guess on that. I'd say maybe [fol. 182] 15 feet.

Q. Did you actually see him fall?

A. No, sir.

Q. You turned around?

A. When I turned around I seen him getting up—trying to get the wire off of his legs.

Q. So the time you turned around and saw him getting up, he was getting some wire off his legs?

A. Yes, sir; he was getting up when we walked back there—Mr. Delk and I.

Q. Whereabouts was that in relation to mile post 355?

A. Oh, we may have walked a thousand feet; maybe not so many. As I said, I didn't check it. I haven't checked it since, either.

Q. Would it be within the first thousand feet?

A. As I said, I didn't check it. It was a short distance. It wasn't too far.

Q. Can you estimate it? Would that fit it, within a few thousand feet?

A. I'd say a thousand, 1500 feet, is my guess on it. I'm only guessing on that, because it was 5280 feet in a mile.

Q. Did you or Mr. Delk trip on any wire, Mr. Baumberger?

A. No, we tried to get away from the bad walking around [fol. 183] there. At the time that we were walking that distance, we would walk in what seemed like the better walking, in between the two rails of the southbound main. And when that'd get bad we'd walk over there between the southbound main west track and the eastbound—I mean the east track of the passing train, which is a walkway between the two. It ain't a walkway; those tracks are 13 foot centers.

Q. Did Mr. Clark or Mr. Johnson, as far as you know, either of them—did they trip and fall?

A. I didn't see them if they did.

Q. Mr. Baumberger, could you state how old you are?

A. Yes, sir; I'll be 66 years old on the 30th day of next month.

Q. And how tall are you, sir?

A. Five feet four and three-quarters, and I weigh 150 pounds; been weighing 165.

Q. That was my next question. Now, did Bert Smith get up by himself, Mr. Baumberger?

A. Yes, sir.

Q. You didn't have to help him up?

A. At which time are you talking about now?

Q. I'm talking about the time you said you saw him fall.

A. The first time? second time? third time?

Q. I was talking about the time you said you looked back [fol. 184] and there was a piece of wire.

A. Well, that would be the first time.

Q. The first time?

A. Yes; he got up himself each time except there the last time he fell. I took ahold of his arm and helped him up. Whether I had to or not, I don't know. He said he could make it from there on to the 356 mile post.

Q. Did he seem to be in any difficulty when he got up the first time, Mr. Baumberger?

A. No, sir.

Q. Did he seem to be walking along all right?

A. I didn't pay any attention to it after that. When he got the wire loose from him he throwed it away and we started on, Mr. Delk and I did.

Q. You mean you didn't check Mr. Bert Smith at that time to see whether he was all right?

A. He was already on his feet.

Q. Did he seem to be walking ahead all right?

A. Yes; I thought at that time he was all right. I didn't pay too much attention to him.

Q. So you and Mr. Delk as his representatives then, went on ahead and left him bringing up the rear.

A. That's right. We didn't get away from him any more than to talk to him. Between the heat and the conversation with him, as heavy as he was, I thought it was not the thing [fol. 185] for us to do.

Q. So as his representatives you walked on ahead of him and gradually stretched the distance out until you got to the 356 mile post?

A. That's right.

Q. As to this wire you saw, Mr. Baumberger, was it a complete loop of wire, or what was it?

A. It looked like—it had an end to it all right. It looked like to me, it was looped. He was trying to get loose from it around his feet. When he got it loose and throwed it away, I was no more interested.

Q. Had it been cut or was it a complete loop?

A. Well, it looked like one end had been cut, and it was still in a loop because he was trying to get it out from under his pantleg and around his leg, too.

Q. Do you know where that wire came from, Mr. Baumberger?

A. No, sir; it could come from several places.

Q. Do you know how long it had been there?

A. No, sir; I do not.

Q. Mr. Baumberger, did you get up to 356 mile post before Mr. Smith fell the second time?

A. No, sir. We wasn't near there.

Q. Whereabouts were you?

A. I don't recall, but I'd say probably 1500 feet. It might [fol. 186] have been 2000.

Q. Of course, by that time you were ahead of him?

A. Oh, yes; we were—by that time we must have been 10, and maybe 15 rail cars—car lengths, anyway.

Q. So at that point you were 1500 to 2000 feet from mile post 355 where you started out?

A. 356; now, let's not get ourselves mixed up.

Q. You were that far from which mile post?

A. 356.

Q. That's where you ended up?

A. That's where we ended up.

Q. How far behind you was Bert Smith? You said 15 to 20 car lengths, now. What would that be in feet?

A. You asked me about the second time he fell?

Q. That's right.

A. All right, now. On the second time he fell we was some 1500 to 2000 feet from the 356 mile post. That's only to hazard a guess now. I didn't measure it. When he fell the second time is after we had already got there, and I looked around and seen him down. I didn't see him fall then.

Q. You're getting ahead of me, Mr. Baumberger. You were where when he fell the second time?

A. 1500 to 2000 feet from the 356 mile post.

Q. And he was how far north of you?

A. As I said, somewhere between a thousand and 1500. [fol. 187] That's hazarding a guess—a considerable distance, or as I said a minute ago, I believe it was around 10 or 15 car lengths.

Q. Now, did you go back to him at that time?

A. The second time, no, sir, because he got up.

Q. He got up by himself the second time?

A. Yes, and we kept walking.

Q. Did you observe him after he got up?

A. No, I was too far away. I seen him get up and start walking again.

Q. And you didn't feel it was necessary to go back and check on him at that time?

A. No, sir.

Q. And Mr. Delk didn't, either?

A. No, sir.

Q. You just kept walking on?

A. Because he was walking.

Q. You were probably 1500 feet ahead of him?

A. I'd say anywhere from 10 to 15 car lengths, railroad car lengths, or probably—I can't estimate the distance exactly, as I tried to say to the jury here—I didn't pay too much attention to that.

Q. You weren't particularly concerned with it, Mr. Baumberger?

A. No. I was concerned over the heat and what may happen to him. I was concerned over that, because the man [fol. 188] just came out of the hospital.

Q. Do you know what the weather was that day, Mr. Baumberger?

A. I know it was about as hot a day as I've seen in a long time. When I got at 356 mile post I was not walking fast, but I was getting my breath like Mr. Clark and Mr. Johnson was, too. And Mr. Delk, and all of us.

Q. Do you know what the temperature was, Mr. Baumberger?

A. No, sir. All I can say is that it was pretty hot.

Q. Was there any wind that day?

A. I don't recall that there was any wind at all.

Q. Was it raining, sir, or was it dry?

A. No, sir, the sun was shining bright; hot.

Q. Now, you finally got up to 356 mile post.

A. That's right.

Q. Were you walking as fast as you could, Mr. Baumberger, or could you have walked faster?

A. I could have run very easily if the necessity required it. You asked about my physical condition now.

Q. As you walked along the right of way there, were you walking as fast as you could, or were you—

A. No, sir; I didn't try to walk as fast as I could. I don't think anybody was.

[fol. 189] Q. And it took you how long to walk the mile?

A. We started out at 9:02 and wound up at 9:25. That would be about 23 minutes.

Q. You and Mr. Delk arrived at the same time?

A. Yes; sir, we was right together.

Q. Now, did you say anything to Mr. Clark or did he say anything to you at that time?

A. No; we was talking about how hot the weather was.

Q. That was the sum and substance of your conversation, talking about the weather?

A. At the start, yes, sir.

Q. And did Mr. Delk say anything else?

A. No, he was talking about how hot it was, too, and about that time I looked around—I don't know whether the others did or not—and I says to him, "He's down again," and we waited and he didn't get up, and we waited and he didn't get up. So I said—I become alarmed then. I said, "This thing's got to stop. That man"—

Q. You and Mr. Delk sat there and watched Mr. Smith down the track?

A. Sat where?

Q. At 356 mile post?

A. We didn't even sit down, sir.

Q. You were standing there?

A. Yes, sir.

[fol. 190] Q. When he fell did you go back toward him?

A. I started but Mr. Bader said he'd drive me up there.

Q. Actually, Bader had come up with a car in the meantime, to drive you back, hadn't he?

A. I don't recall whether he was already there or not. There's a possibility that he was already there, but he walked over to where we was at when we started talking, and that's when I spoke to him.

Q. Now, how many times did Mr. Smith fall altogether, Mr. Baumberger?

A. I say he fell three times.

Q. Three times?

A. First, when he first started out there a short distance, and the second time, and then the third time when he stayed down, but he got back up there.

Q. So after you got to 356 mile post you saw him fall one time.

A. I did not see him fall neither time, but I seen him getting up, except the third time he didn't get up until we got back there.

Q. Now, when you went back did you look over or attempt to look over the area where he fell the second time?

A. No, sir.

Q. Because that was way behind and you didn't go back [fol. 191] there?

A. No, sir; I was more anxious to get the man to a hospital or to a doctor.

Q. And when you got down to where he was did you look around at all?

A. No, sir; as I said when I got down to where he was at—Mr. Bader was with me—his lips was all purple and his face looked like he was having a heart attack. We left him laying right on his stomach there and I said, "We better let him catch his breath." And then I'll repeat what I said a while ago, Smith said, "How much farther is it?" And I says, "It don't make any difference how far it is. You're going to a doctor. You ain't going nowhere else."

Q. Now, Mr. Baumberger, when Mr. Frates was asking you questions you gave some estimates as to distances you could see along the track.

A. About what?

Q. How far is it from, say, Flagler Street up to the yard at Buena Vista?

A. I can only give you in blocks.

Q. Do you know in mile posts?

A. Well, 366 mile post is right down here at the bridge.

Q. What's the mile post at Buena Vista?

A. 366.4, I think it is.

[fol. 192] Q. Can you see from here up to Buena Vista?

A. No, sir; there's a curve in there.

Q. Are there other curves on the railroad, Mr. Baumberger?

A. Oh, yes; many of them.

Q. A lot of curves?

A. Yes, sir; plenty of them.

Q. Of course, you can't see around the curves, can you?

A. Not hardly, unless there was no foliage around there. Then you can see around them. By "foliage" I mean trees.

Q. Is the mile post at West Palm Beach 299? Does that sound right?

A. Right; it sets right across the station.

Q. At Lake Worth, 306?

A. Yes, sir; that's 306.

Q. Can you see from West Palm Beach to Lake Worth?

A. No, sir; there's about two or three curves in there.

Q. When you get up to Lantana there are a lot of curves, aren't there?

A. Yes, between Hypoluxo and Lantana; the two of them are right together.

Q. So in terms of—

A. You have three curves.

[fol. 193] Q. So in terms of a flagman, he'd have to go back and take into consideration all of those curves wherever he walked, wouldn't he?

A. It all depends on the distance on that. I've flagged on this railroad under all kinds of conditions, before they even had automatic block territory.

The Court: I'm going to have to interrupt, Mr. Sullivan, for the recess I advised the counsels of for the hearing of matters before the Court.

With the permission of the respective counsels, I will not place the jury in this room, but will let them move about while I hear these other matters.

Gentlemen of the jury, we will convene at 3:30, and you are free to move around, with the previous instructions I've given you until that time.

(Thereupon a short recess was taken, after which the following proceedings were had:)

The Court: Is there anything to come to my attention, gentlemen, before we bring the jury back?

Mr. Sullivan: No, your Honor.

Mr. Frates: No, sir.

The Court: Bring the jury in.

(Thereupon the jury returned to the courtroom, and the following proceedings were had:)

The Court: I believe I interrupted when Mr. Baumberger [fol. 194] was on the stand. Mr. Baumberger, come up and take the stand again, please.

Thereupon—

P. J. BAUMBERGER, the witness on the stand at the time of recess resumed the stand and testified further as follows:

Cross examination (Continued).

By Mr. Sullivan:

Q. Mr. Baumberger, do you know Mr. Delk?

A. Yes, sir.

Q. Does he live in New Smyrna Beach?

A. Yes, sir.

Q. Is he still up there, as far as you know?

A. As far as I know, that's right. I don't know where he's at.

Q. Now, you're familiar, sir, with Rule 99 of the Rules of the transportation department, are you not?

A. Yes, and the exceptions connected with it.

Q. Let me read part of Rule 99 to you, Mr. Baumberger. "When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes and when necessary, in addition, displaying lighted fusees . . . " You're familiar with that rule?

[fol. 195] A. Yes, sir.

Q. So that it requires a flagman, does it not, to go back a sufficient distance and put down torpedoes in any event?

A. That's what the rule says, yes, sir.

Q. And the distance, of course, would be far enough back so that the engineer of an oncoming train would hear the torpedoes explode as he ran over it and be able to stop?

A. The distance of the judgment of the flagman, until he gets into trouble. Then it's the judgment of the railroad company.

Q. Based on your own experience, Mr. Baumberger, to apply to that rule you'd have to go back far enough to allow the engineer to hear the torpedoes explode and stop his train.

A. If you had a condition of that kind, that would be true.

Q. And then the rule also requires that if the flagman in his opinion, thinks it necessary to put down fusees as well—

A. No, the rule don't say that, exactly. It provides that you leave a fusee, if necessary—in accordance with the return, you signal. Rule 99 is not the only one that governs.

Q. That's one of the rules that governs.

[fol. 196] A. The engineer blows you out and you must wait until the engineer blows you out.

Q. If the engineer blows you out do you have to go back?

A. That's right.

Q. But if you think it's necessary you go back on your own.

A. The rule doesn't—as I understand the rule, you don't have to wait until the engineer blows you out.

Q. That's right. If you think it's necessary you better get back there on your own before the engineer does anything.

A. Well, that's what the rule says, anyway.

Q. Mr. Baumberger, going back earlier to your testimony, to visibility down the track, what was your testimony as to the distance you could see a man along the track?

A. Well, let's read it over and see what it says.

Q. Well, I'm asking you your estimation now.

A. The estimate—I said about a mile.

Q. You can see a man about a mile along the track?

A. Yes, if you're up on the engine you can see a lot farther distance than you can if you're on the ground.

Q. If you're up in an engine traveling along a track, assuming a straight track, what distance ahead can you see a man on the track?

[fol. 197] A. I said approximately a mile.

Q. About a mile?

A. It all depends on your visibility.

Q. Of course, with a fusee and the smoke will depend a lot on the wind conditions, won't it?

A. Certainly. I think I testified to that.

Q. If you have a cross-wind it will blow it right behind a tree or building.

A. Not necessarily. Those fusees—they vary, of course, with the wind. If you've got a strong wind they go out. I mean, smoke will go out this way or that way, whichever way the wind is blowing.

Q. If you have a strong wind it will blow it right off the track, won't it?

A. No, I don't think the railroad company would be that careless with that kind of protection.

Q. I'm not asking about the railroad company, Mr. Baumberger. I'm asking you that, in your own observations, what happens to—

A. Of course, we're taught by the railroad.

Q. Now, let's go back to my question. Suppose you have a cross-wind. Isn't it going to blow the smoke right off the track, Mr. Baumberger?

A. It will lean whichever way the wind is blowing, sure, and how hard—

[fol. 198] Q. Mr. Baumberger, does a flagman also have the duty of making a brake test before a train starts out?

A. That's out of the terminal, at Ft. Pierce where no car inspectors are employed.

Q. So that coming down from Ft. Pierce one of the flagman's duties is to walk completely around the train to check the brakes.

A. That's right.

Q. And how long are those passenger trains? How long is an average passenger train, Mr. Baumberger?

A. I don't know about averages. Now we're hauling pas-

senger trains over here anywhere from 6 cars to 22. So you have to strike your own average. Some of them has a "consist" of 16 cars.

Q. About how long is a passenger car?

A. They vary. I think it's about 70 feet. I'm not sure.

Q. And they also have diesel engines attached to them?

A. Oh, yes; all are diesel engines, yes.

Q. Usually they have two or more diesel units, don't they, Mr. Baumberger?

A. No, sir, not usually.

Q. In passenger trains?

A. No; some of them only have one.

[fol. 199] Q. Don't most passenger trains usually have two diesels?

A. It depends on the size of your train.

Q. Let's take the Champion that leaves here every morning.

A. It has two now, I think. But I have run that train when it had three.

Q. So the flagman has to walk the entire length of the train, and then back again, doesn't he?

A. That's right. Are you talking about inspecting the train now?

Q. That's right. Now, are you familiar with a term "efficiency test," Mr. Baumberger?

A. Yes, sir; I know what an efficiency test is.

Q. Now, an efficiency test is a test given by various railroad people in supervisory capacities to check and see if the railroad train crews are complying with the rules. Isn't that what it is?

A. That's right.

Q. And they've been commonly given on the railroad for a number of years, haven't they?

A. Yes, I think since we had automatic block signals.

Q. And one of the common kinds of efficiency tests is to go in and put a jumper or short circuit to the block signal, is it not, to give an engineer a red block signal and see if [fol. 200] he stops for it?

A. I wouldn't know just what the authorities do. I've never seen them manipulate those signals.

Q. It is, and has been standard practice to give efficiency tests to see if various rules are complied with.

A. That's right.

Q. And, in effect, to create an emergency condition for what the train crew may think is an emergency condition, to see if they'll comply with the rules under those circumstances. Isn't that what an efficiency test is?

A. That's what they claim it is. There are different ways to put those efficiency tests on.

Q. And they're given every single day, aren't they, Mr. Baumberger?

A. I wouldn't know. We don't know. We assume when we're stopped and can't see what we're stopped for, that it's an efficiency test.

Q. It may be an emergency; it may be an efficiency test. You don't know.

A. That's right. We don't know what we're being stopped for.

Q. And a road foreman of engines can go up in the engine and blow him out, can't he?

A. He can do whatever he wants to.

Q. Giving an efficiency test, if the flagman got down off [fol. 201] the train he could blow him off to see if he was complying with the rules, can't he?

A. They're not all the same thing all the time.

Q. They give different tests for different employees, don't they?

A. I don't know. I think it depends on the official, mostly, putting it on more than the employee that they're testing.

Q. And you have seen various employees disciplined for infractions of those rules, haven't you, Mr. Baumberger?

A. Yes, sir.

Q. And during those efficiency tests there's no union representative present when they're given, is there?

A. How is that?

Q. There's no union representative present with any employee when those tests are given.

A. Oh, no. They've been having an investigation about it if he's present, if he wants it. On the other hand, he may not want it.

Q. In your experience over a good many years, it has

been accepted practice to see if the train crews are obeying the rules by giving efficiency tests.

A. Now, listen: You're covering a big territory when you say "accepted practice." It's just when the official wants to do it.

[fol. 202] Q. It's pretty much up to him whether he gives one or doesn't give one; is that right?

A. That's right.

Mr. Sullivan: Thank you. I have no further questions.

Redirect examination.

By Mr. Frates:

Q. Mr. Baumberger, Mr. Sullivan mentioned some curves at Hypoluxo and Lantana and Lake Worth. I assume those curves have been there for a great many years, have they not?

A. Ever since the railroad has been built.

Q. And Bert Smith has been flagging over those curves for a great many years, has he not?

A. Ever since he's been here.

Q. I think you've already testified that, actually, he walks about the same way since you've known him. He's not a fast walker, by any means.

A. That's right.

Q. He was performing his duties satisfactorily as a flagman?

A. As far as I know.

Mr. Sullivan: Your Honor, I was going to say I don't think Mr. Baumberger is qualified—he said he hadn't ridden with him since 1955.

Mr. Frates: No, he didn't say that at all, Mr. Sullivan. He said he hadn't worked with him. The last time he [fol. 203] worked with him was in May, 1955.

The Court: I will overrule it and leave the question of it with the jury.

By Mr. Frates:

Q. So far as the railroad was concerned, the officials of the railroad, Bert Smith was performing his duties as flagman satisfactorily?

Mr. Sullivan: Your Honor, I object to that as calling for Mr. Baumberger's conclusion. I don't think he's qualified to answer that question.

The Court: I will overrule the last objection.

Mr. Frates: Read it, please.

(The pending question was read by the Reporter as above recorded.)

The Witness: Yes, sir, as far as I know.

By Mr. Frates:

Q. Now, those efficiency tests that Mr. Sullivan talked about—those are whether or not the fireman and engineer, generally, are looking at the block signals, isn't it?

A. That's part of it, and the others—where the flagman drops a fusee off when the train is reducing speed, and when the train comes to rest, whether the flagman gets down on the ground with his proper flagging equipment to insure protection.

Q. Now, under those tests if the trainman or the flagman—and that would be the same thing as Mr. Smith, wouldn't [fol. 204] it—dropped the fusee and got down? Then the test would be satisfactorily completed, would it not?

A. That's what I've seen.

Q. And that's the type of test that they give on the line?

A. That's right.

Q. Now, what is the maximum speed limit at the present time? I think it's been testified as 75 miles an hour. Are you aware of that, sir, for passenger trains?

A. They changed it. I understand that the maximum was 79.

Q. Seventy-nine. What did I say?

A. Seventy-five.

Q. I'm sorry; 79. Now, at one time do you know whether or not that was higher a few years back?

A. Yes, as I recall, it was higher, when we first got the diesels.

Q. Wasn't it 90 miles an hour?

A. I don't recall, but I run the Chicago train there for one whole winter, going across the cutoff from Bunnell to St. Augustine, and we made as high as 110 and 115 miles an hour.

Q. Now, during those periods of years when the speed limit was higher than the present 79, was Smith flagging?

A. Yes.

[fol. 205] Q. For the Florida East Coast?

A. Yes, sir.

Q. And was he in the same general physical condition outwardly as he is now? I realize you're not a doctor—as far as his ability to get around?

A. I'd say he got around just about as fast—as close as I could answer that.

Mr. Frates: That's all. I have no further questions.

Recross examination.

By Mr. Sullivan:

Q. I just have a couple more, Mr. Baumberger. Have you seen occasions where a flagman has been disciplined or discharged as a result of an efficiency test?

A. Yes, I recall one about a year ago, I think—maybe a little longer.

Q. You have your correspondence file?

Mr. Frates: Just a moment, your Honor. I object to that question if he's not going to ask him a little bit more about it. I don't think he can ask the question if he's been discharged for an efficiency test.

Mr. Sullivan: Your Honor, I prefer to conduct my own interrogation.

Mr. Frates: Your Honor, that wasn't brought out in direct examination. I haven't made the objection on that basis, but I think if we're going to bring it out let's cover [fol. 206] the complete—

Mr. Frates: Read that, please.

(The pending question was read by the Reporter as above recorded.)

The Witness: I should confine that to dismissal—

The Court: I will overrule the last objection.

By Mr. Sullivan:

Q. Now, Mr. Baumberger, you have your correspondence file concerning this injury to Bert Smith? Do you have it with you?

A. The only thing that's been read in testimony here.

Q. I wanted to ask you if on September the 14th, 1956, you wrote a letter, along with Mr. Delk, to Mr. Beals, the Chief Operating Officer?

A. That's right.

Q. And it concerned this test?

A. I'd have to look at that file. Have you got the letter? It might save a little time.

Q. Do you have your own copy of it, Mr. Baumberger?

A. I haven't got it with me. I've got it at the office.

Q. I wonder if you could look at that and tell me if that's a copy of the letter.

A. That's a mimeographed copy. Yes, sir; I have it here. The date is the 14th.

Q. In that letter, Mr. Baumberger, written the day after [fol. 207] the accident, did you write to Mr. Beals and say—

OFFER IN EVIDENCE

Mr. Frates: Just a moment. I object to that. If he's going to offer the letter in evidence, let's offer it. I don't think it's proper, and Mr. Sullivan knows it isn't proper to show him the letter and then say, "Did you say?"

Mr. Sullivan: Your Honor, as Mr. Frates knows, I can't offer anything in evidence.

Mr. Frates: If you can't offer anything in evidence, you certainly can't start reading a letter.

The Court: I will sustain the objection to the reading in evidence. Do you have any objection?

Mr. Sullivan: We'd like to have it introduced, your Honor.

Mr. Frates: I'd like to see it, because I don't know whether it's material or not . . . I have no objection. I don't know whether it's material, but I have no objection.

The Court: Admit the letter and mark it as a defendant's exhibit, please.

(The letter referred to was thereupon marked, "Defendant's Exhibit A.")

By Mr. Sullivan:

Q. You have your own copy of that letter, Mr. Baumberger?

A. Yes, sir.

Q. Now, the day after—that was written the day after this injury to Bert Smith?

[fol. 208] A. That's right.

Q. And did you state at that time, "As everyone knows, Smith is still a heavy man, although the Company doctors have reduced his weight some 65 pounds and there can be no question about him being in a weakened condition, but still he was in far better physical condition than he was prior to his voluntary laying off and going to the hospital in May."

Did you write that, in part, in that letter?

A. Yes, sir; that's right.

Q. Now, the day before, Mr. Baumberger, the letter that you gave to Mr. Clark—you have your copy of that one.

The Court: What was the question, Mr. Sullivan?

Mr. Sullivan: I was waiting until Mr. Baumberger got his copy of the letter.

By Mr. Sullivan:

Q. Now, the day before that letter to Mr. Clark, you stated, "Trainman Smith left Miami September 9, 1956, and went to St. Augustine for a general checkup at the hospital the morning of September 10. Chief Surgeon, Dr. Lockwood, gave a general checkup, including walking through the hospital hall, and informed Smith he was able to return to work as he was much improved and that he would not "Bad Order."

Did you write that?
A. Yes, sir.

Mr. Sullivan: I have no further questions.

[fol. 209] Reredirect examination.

By Mr. Frates:

Q. Mr. Baumberger, this brakeman that was dismissed as a result of the efficiency test—what were the circumstances in that case?

A. The circumstances was that when they stopped, when the train stopped he failed—when the train reduced speed he failed to throw a fusee out, according to the testimony of the men that conducted that efficiency test.

Q. In other words, he failed to just light one of these and throw it off?

A. That's right, and then when the train come to a complete stop at the red signal, this man failed to get on the ground immediately, as it was stop and start—that red signal on the railroad, there's a stop and proceed signal.

But you must stop, and this man failed to get on the ground. That man claimed in the investigation which his statement was ignored, that there was interference in the vestibule of the car; that he couldn't get the trapdoor open quick enough, and by the time he did, the train was going. He did not blow any flag out or anything of the kind, or didn't blow any in.

Q. But, apart from his story, as far as the railroad was concerned, he was dismissed for not throwing one of these off the train, and not getting on the ground?

[fol. 210] A. That's right.

Q. Those were the two charges. There wasn't any failure to go back any distance, sir, was there?

A. No, sir.

Q. Now, they dismissed that man for that, didn't they?

A. That's right.

Q. And during that period of time Bert Smith was working as a flagman, was he not?

A. That's right; I'm sure he was.

Q. Mr. Sullivan has asked you about other occasions. Do you know a B. A. Collins?

A. Yes, sir.

Mr. Sullivan: Your Honor, I make the same objection I made before.

Mr. Frates: Your Honor, I don't see how Mr. Sullivan in good grace can ask about other incidents, and when I want to bring up some other person who's named in these letters, he objects to it.

Mr. Sullivan: Unless Mr. Collins had something to do with the efficiency test.

Mr. Frates: We don't know what Mr. Collins—

Mr. Sullivan: Your Honor ruled on it before.

Mr. Frates: But Mr. Sullivan opened the door and asked about other flagmen and other brakemen, and were they [fol. 211] dismissed, and, certainly, we can go into the other phase of it.

The Court: I can't see the present relevancy of going into all the details of it. If you want to ask him—

Mr. Frates: I want to ask him one thing, what his occupation was and if it's similar to Mr. Smith's.

The Court: All right.

By Mr. Frates:

Q. Mr. Baumberger, do you know a B. A. Collins?

A. I do.

Mr. Sullivan: Your Honor, can I note my objection?

The Court: I will note your objection to all these questions regarding B. A. Collins.

By Mr. Frates:

Q. And is he an employee of the Florida East Coast?

A. He is.

Q. What is his job on the Florida East Coast?

A. Passenger flagman.

Q. And is that similar to the duties Mr. Smith has?

A. Same duties.

Q. And is Mr. Collins still working for the Florida East Coast at this time, to the best of your knowledge?

A. To my knowledge, he is, up to this morning, anyway.

Mr. Frates: No further questions.
Mr. Sullivan: No further questions.

(Witness excused.)

[fol. 212] Thereupon—

BERT SMITH, the Plaintiff herein, was called in his own behalf, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Frates:

Q. You're Bert Smith, the plaintiff in this case?
A. Yes, sir.
Q. And what is your age, Mr. Smith?
A. I was 62 the 18th of December past.
Q. And are you married?
A. Yes, sir.
Q. And do you have any children?
A. Yes, sir.
Q. And are your children grown up at the present time?
A. Yes, sir.
Q. How long have you worked for the Florida East Coast Railroad?
A. I went to work for the Florida East Coast Railroad September the 7th, 1920.
Q. And how long have you worked as a flagman for the Florida East Coast Railroad?
A. Off and on, ever since I've been there, but what time I could work, I was a flagman-baggageman. But I'd always take the flagging job when I could hold it.
[fol. 213] Q. You're on the seniority list of the baggagemen?
A. And the flagmen.
Q. And the flagmen.
A. That's right.
Q. Now, do you recall when Mr. Clark came to you and told you that you'd have to retire or take a field test?
A. He told me.

Q. Do you recall that particular time, Mr. Smith? I don't want to go into conversation.

A. It was sometime before this test was made. I don't know exactly the date.

Q. Had you been in the hospital prior to that?

A. Yes, sir.

Q. And when had you been in the hospital?

A. I went to St. Augustine in May. They got that date there wrong. They say the 21st but—

Q. You just go ahead and tell us what the date was, to the best of your ability, Mr. Smith.

A. I got there the evening of the 22nd. They say it was the 21st. I don't know.

Q. And how long were you there?

A. I couldn't give you the exact time, but I was there—oh, way over—well over a month.

Q. And what was your trouble during that period of time?

[fol. 214] A. Well, sir, I had arthritis and they never did tell me all the things they were treating me for.

Q. Now, then, did you return back to Miami?

A. I did, sir; after I left the hospital I come back to Miami.

Q. And were you treated down here by Dr. Nash?

A. Yes, sir, I think—yes, sir; I was treated by Dr. Nash until he released me on—I think it was the 16th of August. I'm not positive. I believe that was the date.

Q. Now, did he give you a slip to go back to work and say that you were fit for duty?

A. That is right, sir.

Q. Now, you heard Dr. Lockwood testify about giving you tests, seeing you walk, and so forth. Do you recall when that was?

A. That was on the morning that I went up there for our checkup. That was—I left John Sunday night. I believe; I don't know.

Q. Was that around September the 10th, the first couple weeks in September?

A. Sir?

Q. Was that the first couple of weeks in September of '56?

A. It was 9-something. It was either the 9th or 10th, somewheres along there.

[fol. 215] Q. Dr. Lockwood examined you at that time?

A. Yes, sir; he did, himself.

Q. I have a letter here by Dr. Lockwood. Did he give you that letter?

A. He mailed this letter to me through the United States Mail.

OFFER IN EVIDENCE

Mr. Frates: We offer this letter in evidence. I made some pencil marks on there that I tried to erase. They don't have any—

Mr. Sullivan: Your Honor, I'm going to object to it because Dr. Lockwood was here this morning.

Mr. Frates: It's the letter that he got from Dr. Lockwood, your Honor.

The Court: I will overrule the objection and admit it into evidence and have it marked.

(The letter referred to was thereupon marked, "Plaintiff's Exhibit No. 4.")

Mr. Frates: (To the jury) Gentlemen, this is a letter dated September the 10th, 1956. "Florida East Coast Railway Company; John W. Martin, Trustee. Office of Chief Surgeon. Dr. Vernon A. Lockwood, Chief Surgeon. TO WHOM IT MAY CONCERN: Mr. Bert Smith, who is applying for insurance, was seen in my office today. His general condition has improved markedly during the past few weeks. He has reduced his weight from 327 to 262 pounds, and his arthritis is now under good control with the use [fol. 216] of a cortisone preparation. He does have hypertension, but the heart sounds are regular and of good quality. Urinalysis and blood count were negative. Yours very truly, V. A. Lockwood, M.D."

These, of course, will be available for you to look at.

By Mr. Frates:

Q. Now, Mr. Smith, we have covered, generally, the facts in this case, and to save a little time I'm going to direct

your attention to the actual test itself. You've heard the men talk about you starting out. Will you tell the jury, as you started out there was some wire which has been mentioned, whether or not you tripped over any wire as you—

A. I started out up there at the other end of that—where we started out, and I started walking in between the two main lines, and I got tangled up with some wire and fell down on my hands, and got up and I hollered at them and got the wire loose and throwed that out, and—

Q. Were there any bushes around there?

A. Oh, plenty of them.

Q. Were they in that area where you were walking?

A. Yes, sir. And Mr. Baumberger told me—he says, "Move over—"

Mr. Sullivan: Your Honor, I'm going to object.

The Court: Sustain it.

[fol. 217] By Mr. Frates:

Q. Don't tell what they said. Just go ahead and tell us what you did. That's the first time you got tangled up in the wire.

A. Yes, sir.

Q. Now, how far were you from the crossing where you started when that happened, if you know? You started at the mile post?

A. Yes, sir.

Q. How far were you from there when you fell the first time?—when you got tangled up in the wire?

A. I got tangled up in the wire the first time, and I fell down on my hands, and got that off of me.

Q. Yes, sir, but how far were you from the mile post from where you started, at that time?

A. Oh, just started off.

Q. Continue on.

A. Mr. Baumberger said—

Q. Don't say, Mr. Smith, what anybody said to you. You just tell us what you did.

A. I moved over in between the main line—the south-bound main line and the side track. I continued south. And I got on down there—oh, I don't know how far it was, and I

got tangled up in another piece of wire. And I fell down face forward. I landed on my left knee. And I got up and got that piece of wire off, and I started again.

[fol. 218] And these gopherberry bushes—this grass and rocks, rocks and rocks—there were plenty of rocks. You go over the bridge and there's a certain amount of water in those leaves, and in between, my shoes, and the water out of them—I fell down and that's the last time I fell down that I remember I fell down. And that's when I was out. I hit my—I just landed on that knee again, and I just absolutely was—I was just jagged; that's all there was to it.

Q. Now, before you made that test, then,—you heard them talk about taking you to the doctor.

A. Yes, sir.

Q. Before you made that test, had you been working as a flagman?

A. Yes, sir.

Q. Now, when had been the last run that you made?

A. On Train 29 I made it with Conductor Pender.

Q. When was that in relation to September the 13th, 1956, the date—

A. Hand me that.

Q. No; you just tell to the best of your ability, just approximately—

A. It was sometime in September. I don't know, unless I get the book.

Q. All right; sometime in September. This was on the 13th. Had you been working after the doctors had returned [fol. 219] you to work—had you been working as a flagman?

A. I hadn't lost a day.

Q. Had you had any complaints about the way that you were handling your job?

A. No, sir.

Q. Have you been approximately the same weight that you are at the present time, with some variations, for a good number of years?

A. Up and down.

Q. But, generally, a rather heavy person, have you not?

A. Heavy person.

Q. Through most of your working years?

A. That's right.

Q. Now, you've heard the doctors testify about the fact that you had arthritis and that Dr. Morgan—and that you are unable to work at the present time. Can you tell us how much a year you would make, or the salary of a flagman running from Miami to Ft. Pierce, on the job that you had?

A. I would like to ask somebody here in the room—I don't know.

Q. Well, how much did you make?

A. Three hundred and some dollars; I think it's $326 for 29-day month, and if you work a 30-day month it may be a little more.

[fol. 220] Q. Three hundred and how much?

A. I don't know exactly.

Q. We don't care about the exact figure, Mr. Smith, just a round figure.

A. I don't know exactly the figures, unless Mr. Baumberger—

Q. Well, how much were they paying you, Mr. Smith? How much did you make a month when you worked a full month?

A. Oh, that would run around—now, it would run around—I don't know. They tell me—you see, I haven't worked in nigh a year.

Q. But when you did work, how much did you make a month?

A. Well, sir, I couldn't tell you unless I had—

Q. Could you give us some approximation, Mr. Smith? It was paid on a mileage basis, wasn't it?

A. That's right.

Q. Just give the jury—I know it's complicated and it varies some, depending on the mileage you make; is that right?

A. That's right.

Q. Give us an average monthly income that you would make during the period of time that you were working regularly.

A. I can't do that unless I had the figures here. I got the figures home.

Q. You'll have to give us your best approximation, Mr.

[fol. 221] Smith, of what you made a month when you were working, in round figures. We don't care about the cents, and we realize—

A. You mean the net amount of the check?

Q. Yes, sir; any way you want to give it to us.

A. That's after deductions is out. It would run around, I think around $190 to $201 on that. I'm not positive. I got those figures home. That's after the "deduct" was out.

Q. Mr. Smith, can't you tell this jury what you made, on an average, before this, when you were working steady about a year ago, what the railroad was paying you a month, how much money you were making a month?

A. I got the book right there. I got the book in that case over there, if you want to figure it up.

Q. If that will refresh your recollection, suppose you look at it here. We don't need it as to the final pennies. I think you misunderstand the question that I'm asking you. I just want a round figure. I don't want the exact amount.

A. Well, do you want me to start in '55?

Q. Have you got any there for '56?

A. Yes, sir.

Q. All right. Give us an average month in '56.

A. You'll have to do a little figuring here. On the 3rd and the 13th, it looks like, 1956, is $14.29. On the 4th—that's the 30th, I believe. It's kind of blurred—31, 14.29.

[fol. 222] Mr. Frates: Mr. Sullivan, to save time do you have his records of earnings?

Mr. Sullivan: Only an approximation.

Mr. Frates: Let's take an approximation so we won't have to go and add each one of these figures here, because if we do that, we'll be here for another hour. Will you stipulate? If not, we can just subpoena your records, but he has the records here. We can offer this in evidence if you want them—

Mr. Sullivan: I don't know what they show.

Mr. Frates: You know how much you pay your men on the railroad, Mr. Sullivan. Do you want to stipulate on it or not?

Mr. Sullivan: Your Honor, if Mr. Frates wants to interrogate me, he ought to call me as a witness.

The Court: I will note there's no stipulation.

Mr. Frates: All right; thank you, Mr. Sullivan.

Your Honor, at this time we'd like to ask the Court to issue a subpoena to the bookkeeper of the Florida East Coast here, if we're going to continue on, so they can bring Mr. Smith's records here so we can determine the amount that he was making.

The Court: I will request the Clerk to prepare a subpoena to issue to the paymaster.

By Mr. Frates:

Q. Now, Mr. Smith, have you been able to work since the accident?

[fol. 223] A. No, sir.

Q. You've heard Dr. Morgan testify. Has Dr. Morgan been treating you?

A. Yes, sir; Dr. Morgan has been treating me.

Mr. Frates: I have no further questions, but I have no intention to restrict Mr. Sullivan in his cross examination as long as it's material and relevant to the issues. I won't confine him to what I asked him on direct.

So you can ask him anything you want to, as long as it's material.

Mr. Sullivan: Your Honor, the only request I have to make is if we could break when the doctor comes.

Mr. Frates: That's perfectly agreeable.

The Court: All right. You let me know when he's here.

Cross examination.

By Mr. Sullivan:

Q. Mr. Smith, you've always worked for the railroad as a trainman, have you not?

A. For the Florida East Coast Railroad; I've always worked for them.

Q. Yes, as a trainman.

A. Yes, sir. I worked as a trainman, a baggageman or a flagman, either one you want to call it.

Q. You probably started out working freight trains, didn't you, Mr. Smith?

[fol. 224] A. Both.

Q. As you got more seniority you began working passenger trains?

A. Yes, sir.

Q. And since 1950, Mr. Smith, have you worked in any capacity other than as a flagman?

A. Yes, sir; I worked—let me have that book again.

Mr. Frates: Mr. Smith, can't you just tell him what you worked for?

The Witness: I run baggage on 88 and 73, and during Mr. Carlisle's stay on the race horse training at Hialeah, running baggage on there.

By Mr. Sullivan:

Q. How many years was that, Mr. Smith? one year?

A. Oh, just while the race horse training was on.

Q. And the rest of every year you worked as a flagman on a passenger train?

A. As a flagman on a passenger train; yes, sir.

Q. When you were on board the train, Mr. Smith, you checked the train on curves, but most of the time you can just sit down and check periodically, can't you?

A. I look around, open the vestibule door and look around the curves and see if there's any hot boxes to break riggings down; see that the train is intact, and see that there ain't nothing the matter with the train, to the best of my [fol. 225] ability.

Q. Suppose a train is on a straight of way and not on a curve. Do you have any duties then?

A. I go out and take a look then. You don't never know when a braked rigging is going to fall.

Q. Are you on constant lookout or—

A. I go out when I think it's necessary. I don't take very many chances.

Q. And the rest of the time you can sit down on one of the rear cars in the train; is that right?

A. That's right.

Q. Of course, when the train stops you get down with your flagging equipment, prepared to go back if you have to.

A. Go back if necessary; yes, sir.

Q. And the main—the chief purpose you have on the train is in the event of an emergency in protecting the rear of the train, is it not, sir?

A. That is correct, sir.

Q. Of course, if there is an emergency you'd have to go back any hour of the day or night you happen to be on the train.

A. That's right.

Q. Regardless of weather conditions or anything else.

A. That's right.

[fol. 226] Q. You heard us talk about the block signal system, Mr. Smith. You're familiar with that, of course.

A. Yes.

Q. Of course, if an engineer gets a green light, if there's a green light on the block signal he can proceed. If it's yellow, it's caution; and if it's a red, he slows to stop.

A. You see, I can't see those block signals up there. He's up there on the front end, and I don't see those, unless I'm going around a curve looking around them doors. As long as they're green, he proceeds.

Q. You've seen those signals operating, haven't you, Mr. Smith?

A. Oh, yes.

Q. As a flagman, you have to know, generally, how they do operate.

A. Yes, sir.

Q. And, of course, Mr. Smith, the thing that you're chiefly concerned with is if you have to go back in case of some emergency and whether or not the block signal behind you is working, isn't it?

A. I go back if necessary; that's right.

Q. Actually, don't you always go behind the block signal to the rear?

A. There's no rule in the rule book where you go behind [fol. 227] the block signal.

Q. I'm asking you, based upon your own experience in flagging a good many years, don't you go behind the block signal, Mr. Smith?

A. I don't never go back there unless I think it's necessary.

Q. How far have you had to walk back, Mr. Smith, in various emergencies when you have had to protect the rear of the train?

A. Well, I walked—I believe it was from Kelsey City back to Prosperity.

Q. How far would that be, sir?

A. Well, that's about—nigh near a mile.

Q. Is there any other occasion that you can now think of when you'd have to walk a mile?

A. Lake Worth to Hypoluxo, I think I walked in—I mean, Lantana, somewhere along there. I walked back there.

Q. When you go back, of course, you're supposed to put down torpedoes, aren't you, Mr. Smith?

A. Yes, sir.

Q. And you have to put those torpedoes down a sufficient distance to the rear of the train you're on so that an oncoming train can explode the torpedoes and still stop.

A. You go back and put down the torpedoes; that's right. [fol. 228] Q. And the distance is determined by the distance down the track that it would take in your estimation, an oncoming train to explode the torpedoes and then stop?

A. That's right.

Q. Mr. Smith, when I asked you about going back behind the block signal, I want to refer you to the time when we took your deposition in our office. Do you remember that?

A. Yes.

Q. And your testimony was taken before a court reporter.

A. That's right.

Q. It was taken under oath, sir.

A. That's right.

Q. One of your attorneys was with you.

A. That's right.

Q. I'd like to ask you if you can remember my asking you these questions and your giving these answers?

Mr. Frates: What page, Mr. Sullivan?

Mr. Sullivan: Pages 13 and 14.

By Mr. Sullivan:

"Q. How far back would you go when you go back to protect the rear of the train?"

"A. There's no specified distance, other than to say when you go back you will go back behind the block. You will never wait for the block to stop following traffic."

[fol. 229] Is that your answer to that?

A. That's—you'll never wait for the train to stop the block, but don't forget, if a train is coming against you you could flag the train before you could get to the block.

Q. But isn't it true, Mr. Smith, that you will go behind the block in terms of how far back you'll go to flag?

A. Lots of times I do. Lots of times I don't. There's nothing in the rule book about that.

Q. And yet you gave this answer under oath before:

"A. You will never wait for the block to stop the following train."

A. You'll never wait for it to be blowed out—the train—when a train needs protection you'll always go out there to protect a train.

Q. And did you also say there's no specified distance other than, say, when you go back you will go back behind the block?

A. If the train stops right there and the block is right there, you haven't got more than maybe 60 foot.

Q. And if the train stops just short of one block, you've got just about a mile back to the next block.

Mr. Frates: Not if you take the length of the train, Mr. Sullivan. That's an unfair question.

By Mr. Sullivan:

Q. Excluding the length of the train.

[fol. 230] A. Sir?

Q. If the engine stops by one block you'll have to go back by the next block, wherever it is.

A. I go back a sufficient distance to protect the rear of the train.

Q. Mr. Smith, this was your answer when we took your testimony before. Is that correct, sir?

A. This particular question you have there?

Q. That question and answer I just read to you, Mr. Smith.

A. Well, sir, I don't know as I remember it, but I'll tell you one thing. I can say one thing. I always protect the rear of the train. I don't have a copy of the thing in front of me. I didn't have a copy of it, and if that particular—there's nothing in the rule book says you will go back—

Q. I'm asking you if—

Mr. Frates: Mr. Sullivan, I will stipulate that that's accurately transcribed and that's what he said at the deposition, by a duly authorized reporter.

By Mr. Sullivan:

Q. Would you consider it good practice, Mr. Smith, to go behind the block at the rear of the train?

A. I just told you, Mr. Sullivan, that I don't take any chances. I do a good job flagging, and I don't like to take [fol. 231] any chances, so I don't.

Q. If you have any doubt you'd go further back, rather than staying close to the train. Is that correct?

A. It says when the view is obstructed, and on straight track it's a different story.

Q. Are you referring to some rule now, Mr. Smith, about when the view is obstructed?

A. When the view of the train—when you can't look around like this, then I go on around there. I want to be sure that the train is well protected. That is right.

Q. And on various occasions where you have actually

gone out in an emergency, you've gone back a mile. Is that right?

A. I went back there from Lantana to Lake Worth one time, and I went back there from Kelsey City—they call it Lake Park—to Prosperity there, to flag. Joe Jameson, the engineer on the second, 345, and he says, "What in the world did you come all the way back here for?" I said, "I just wanted—he blowed me out and I was going to keep walking until he blowed me in."

Q. How far did you go back in each of those cases, Mr. Smith?

A. There was practically a mile there. And one time over there at—well, go ahead.

Q. Do you want to make any further answer to that [fol. 232] question?

A. It's easy—it's practically a mile on each one of them, or more than that.

Q. Now, Mr. Smith, there's been testimony about your having complaints of arthritis in your left knee, or both knees. When was it that you started to develop this arthritis?

Mr. Frates: You mean, Mr. Sullivan, when he was aware of it.

Mr. Sullivan: That's right.

The Witness: I don't know. I couldn't—I believe '4—the first pain, I believe, I ever felt in my knee, I believe was '42. I'm not positive.

By Mr. Sullivan:

Q. Sometime in 1942?

A. I'm not positive.

Q. Have doctors treated you for this off and on over the years, Mr. Smith, since 1942?

A. Yes, sir.

Q. Did Dr. P. J. Manson treat you for your left knee back in March and April of last year?

A. Yes, sir.

Q. That was for an arthritic condition in your knee?

A. That's right.

Q. And after that, you laid off and went up to the hospital in St. Augustine in connection with your knee, and also in connection with being overweight?

[fol. 233] A. When? In May there?

Q. In May and June of last year.

A. I went up there on, I think it was the 21st of May, or the 22nd of May I got there on the Champion that afternoon. I went up there; I told you further there in the statement they never did tell me what they was treating me for, besides the arthritis.

Q. Did they put you on any diet up there, Mr. Smith?

A. Oh, yes.

Q. Did anyone ever discuss your weight problem when you were in the hospital?

A. They told me I was too fat.

Q. Did they say anything about trying to reduce your weight?

A. They did reduce the weight.

Q. Naturally, weren't they treating you for your weight when you were in the hospital?

A. For my weight?

Q. That's right.

A. They was trying to get—they were treating the arthritis and they didn't tell me all the things they was doing, but they put me on a diet and reduced the weight down—I don't—65 or 70 pounds.

Q. Do you know what you weighed when you went in the hospital?

[fol. 234] A. 327.

Q. When you got out were you referred to a doctor in Miami for further treatment?

A. Dr.—as Dr. Lockwood told you here this morning, he sent me back down here to Dr. Nash.

Q. Was that in July and the first part of August of last year that Dr. Nash treated you?

A. When I come back from St. Augustine I went to Dr. Nash. He told me to go back to Dr. Nash.

Q. And again, that was in connection with your knee, Mr. Smith?

A. It was for the arthritis of that knee. He was giving me Meticorten.

Q. And did you continue under Dr. Nash's care up until the time that this test was given you?

A. Yes, sir, and he sent me to Dr. Manson—no; strike that out. He's the man that sent me to Dr. Manson after I was hurt, to find out why my knee didn't—why the swelling in my knee didn't go down and why the blue bloodshot knee where I fell on it twice didn't clear up.

Q. Now, during this test the only part of your body that was injured was your left knee. Is that right, Mr. Smith?

A. And my elbows and it pulled the muscles in the back of my leg when I fell—pulled the muscles in the calf of my leg, and in my hip.

[fol. 235] Q. Now, do you remember the date that Mr. Clark first talked to you about taking a field test?

A. No, sir; it was a few days before—it was a few days—I don't remember the exact date, no, sir.

Q. Was it sometime in September of last year?

A. It was sometime, I believe, in September. I'm not positive.

Q. After you had this discussion with him, did you contact Mr. Delk or Mr. Baumberger?

A. I contacted both of them.

Q. And you told them about your discussion with Mr. Clark?

A. Told them about the discussion with—about what Mr. Clark told me.

Q. Did either Mr. Baumberger or Mr. Delk recommend to you that you go to St. Augustine to see Dr. Lockwood?

A. They told me to go up there and have a checkup. I wanted to get some insurance. I wanted to get some insurance, outside insurance. I didn't want to get none with either one of the unions because when you—if you drop out of one of the unions, it's in the constitution that you automatically lose your policy. And I wanted to take it out with Mr. C. A. Brinegar. He's a conductor here on the railroad.

Q. Now, Mr. Smith, did you go to St. Augustine to see about an insurance examination, or in connection with this [fol. 236] field test?

A. Insurance and a physical checkup.

Q. Did you say anything to Dr. Lockwood when you went up there about a field test?

A. You mean there?

Q. That's right.

A. I don't—I can't—I can't—wait a minute. No, I didn't go. No, no; no; no; I didn't, either. I don't know whether I did or not. I can't answer that question.

Q. You did see Mr. Bauinberger and Mr. Delk and talk to them about it.

A. That's right.

Q. But you can't remember talking to Dr. Lockwood about it?

A. That's right.

Q. Now, Dr. Nash was the doctor who was treating you every day, or every week down here, wasn't he?

A. Dr. Nash was treating me until he sent me up to Dr. Manson's, and I stayed up there.

Q. You didn't go to Dr. Nash about some insurance examination, did you, sir?

A. No, sir; I didn't go there.

Q. Did you mention to Dr. Nash at any time, this discussion about a field test before it was taken?

A. I can't remember whether I did or not.

[fol. 237] Q. Well, actually, Mr. Smith, isn't it true that you went up to see Dr. Lockwood because you wanted to get a statement from him as chief surgeon of the railroad, before this test came off?

A. No, I wanted to get a physical checkup and get the insurance. Mr. Brinegar told me I'd have to get the insurance okay from Dr. Lockwood, the gentleman that set in this chair this morning. I'd have to get one from him on account of I was—the age limit on his policies was 60 years old and I was 62 on December the 18th past, 1956.

Q. So it's your testimony, Mr. Smith, that you went to St. Augustine for this examination, instead of seeing Dr. Nash down here.

A. Mr. Brinegar told me I'd have to get it from the chief surgeon, and Mr. Nash is not the chief surgeon.

Q. Now, on the day that this test was given, Mr. Smith, you first met at 29th Street at the yards up there, did you not?

A. I was up there in the call boy's office.

Q. Did Mr. Clark or Mr. Delk or Mr. Baumberger tell you what this test was to consist of?

A. Mr. Baumberger and Mr. Delk and Mr. Johnson and Mr. Clark was over on the crossing. I was not with them. I was over there by myself.

Q. Did your representatives or Mr. Clark at any time [fol. 238] tell you what this test was to consist of?

Mr. Frates: Are you talking about at 29th Street now, so it will be clear to him.

By Mr. Sullivan:

Q. At any time before it began, Mr. Smith.

A. Sir?

Q. At any time before.

A. I don't believe I understand the question.

Q. I'll withdraw the previous question and ask you another. At any time before this test began, did either of your representatives or Mr. Clark tell you what this test was to be?

A. Mr. Clark told me when he approached me down there that day that, "If you don't take your—I'll come up here, and I got a file up here from the superintendent's office. If you don't come up here and sign these papers, I've got to give you the test."

Q. Did he tell you what the test was to consist of?

A. "We're going to walk you a mile."

Q. That's what he told you?

A. Yes.

Q. And that's what you had to do on other occasions as a flagman, Mr. Smith?

A. Sir?

Q. That's what you had to do on other occasions as a [fol. 239] flagman, Mr. Smith.

A. When the conditions warranted.

Q. Yes, sir. Those were under emergency conditions, you'd have to do that on other occasions?

A. You don't never have to walk no mile.

Q. Are you saying you don't have to walk a mile, Mr. Smith?

A. Sometimes you don't have to walk no mile. What I mean—the time when the man told you about the Lake Worth—about the Lake Park deal, the engineer Harry Pearson, blowed me out then on 75. We run on the day coach. I didn't know what it was. I went back. That was on straight track there for—oh, it's near a mile. I went back there.

Q. Just about a mile. Now, when the test started who were you walking with, Mr. Smith?

A. Who I was walking—started off—Mr. Clark there and Mr. Johnson started off. They was in front of Mr. Baumberger. Mr. Delk—and I was following them, following Mr. Delk.

Q. So Mr. Clark and Mr. Johnson—

A. They was in front.

Q. And then behind them were Mr. Baumberger and Mr. Delk?

A. That's right, and I was behind them.

Q. So there were really three different groups walking down the track.

[fol. 240] A. That's right.

Q. Did they gradually pull away from you as the test started?

A. Not too much.

Q. How far ahead of you were Mr. Clark and Mr. Johnson walking?

A. Oh, they started out—I don't know; they were way down there. They took off. They slowed down.

Q. How about Mr. Baumberger and Mr. Delk?

A. They slowed down.

Q. How far ahead of you were they?

A. They wasn't too far.

Q. Can you give me any estimation?

A. I don't know. You asked me that same question up there in your office, and I told you I didn't know.

Mr. Frates: Mr. Smith, answer the questions that Mr. Sullivan asks you, please.

The Witness: I told him I didn't know.

Mr. Frates: Just answer his questions to the best of your ability.

By Mr. Sullivan:

Q. Is that the answer today?

A. I don't know exactly. I can't remember just how far it was, and I don't know just exactly how far it was.

Q. Do you know how far you'd walked before you came into contact with this wire that caused you to fall?

[fol. 241] A. I don't know; I don't know, and I didn't have anything to measure it with, and I don't know.

Q. Have you been back there since then to try and find out?

A. No, sir, except on the train going back to St. Augustine.

Q. When you started off you were down near a gas plant, weren't you?

A. That's where we started from.

Q. Were you still opposite the gas plant when you had this fall?

A. No, it was north of it just a little bit, right by the fence there.

Q. You were by the fence by the gas plant?

A. About even with the fence, but there's a fence there—a big old fence at this end. That fence goes around that gas plant.

Q. And you were about even with that?

A. No, I was just a little bit north of it there.

Q. North or south?

A. When we come across there at the end of the fence is where we stood there a little while. There was a freight train coming and we stood till the freight train got by, and then we proceeded.

Q. You're talking about the fence that goes around the [fol. 242] gas plant there?

A. Yes.

Q. Did Mr. Delk or Mr. Baumberger come back to you when you fell that time, Mr. Smith?

A. I don't know who come back there. I told you I was all in. I had done fell twice.

Q. Let's say, when you fell the first time, Mr. Smith.

A. They stopped and turned around and looked, and I hollered at him and Mr. Johnson too also, and they turned around and looked and just kept on going.

Q. You're saying that you hollered at Mr. Baumberger and Mr.—

A. No, I just said, "Hi." I wanted to let them know that I got into some wire. That was in between the main line. That was in between the main line, the two main lines is where I started to walk—moved over, I told you, further in the statement, further in the statement there, that I moved over in between the southbound main line and the side track. And that's where I done the walking until it stopped.

Q. Now, Mr. Smith, let me ask you again, going back to when we took your deposition before trial, do you remember this series of questions and answers?

Mr. Frates: What page?

Mr. Sullivan: Page 48.

[fol. 243] "Q. Was there any building or road near there?"

"A. I don't know of any road. I don't know of anything at all. I know it liked to kill me. That's all I know."

"Q. When you got up from that, what did you do?"

"A. I started again."

"Q. Did you yell to Baumberger or Delk?"

"A. No."

A. No. Now then, this way down below, now. That particular—Mr. Sullivan, that's way down south of the plant now.

Q. Let me go back a minute, Mr. Smith, on page 47.

"Q. What happened with this second piece of wire?"

"A. That's when I fell and I got tangled up on that. When it tripped me, down I went. That's when I landed on that knee that time, and that's when the trouble was."

"Q. Did you get up by yourself or did someone have to help you?"

"A. That's what you're reading right there. That's the second time. I fell twice."

"Q. I'm still dealing with the first time, Mr. Smith."

"A. No, I got up by myself."

[fol. 244] "Q. Is there any landmark which you could identify up there concerning where it was?"

"A. I don't have any landmark. I don't know anything about it."

"Q. Is there any building or road near there?"

"A. I don't know of any road. I don't know of anything at all. I know it liked to kill me. That's all I know."

"Q. When you got up from that, what did you do?"

"A. I started again."

"Q. Did you yell to Baumberger or Delk?"

"A. No."

Do you remember that series of questions and answers?

A. I believe that was—now, that is the second time that I fell. That would be really the third time.

Q. How many times did you fall, Mr. Smith?

A. I got tangled up in some wire and fell down on my hands up there by that gas plant.

Q. How many times altogether?

A. I figured three, but I didn't go down—I did not—the wire way down there is when I got tangled up in that wire down there, and I landed on my knee and my stomach, and that liked to have fixed me up. I got up and got the wire off, started again, and that's when I—there was grass there and that's when I got on them gopherberry bush leaves [fol. 245] and that's when I went down and I stayed right there. If I remember right, I stayed there.

I believe Mr. Bader come over there, I believe. I don't

know who it was, but I know one thing. I was just all to pieces. I was just absolutely just about dead.

Q. As I understand you, Mr. Smith, the first time you fell in this wire, you got up and went on. The time you fell on the gopherberry bushes you fell down and stayed down. Is that right?

A. That was the third time.

Q. And at the time when you saw there was water on the gopherberry bushes—

A. I said in the leaves of the green leaves, between that and the rocks where you were walking on them, and there was grass there, too.

Q. When you fell that time, that's the time you stayed there?

A. If I remember right, I believe—I'm telling you, I was just about dead from them two falls. There wasn't but just a few minutes. I was down, and that's when I slipped down on there, and believe me, I was just about dead. I landed on my knee again, on that left knee.

Q. All right, Mr. Smith. Let me go back again to the deposition to make sure I understand you. Now, I was asking you here:

[fol. 246] "Q. Did you yell to Baumberger or Delk?"

"A. No."

"Q. Did anyone see you fall?"

"A. No, I think Baumberger and them seen me. I don't think Clark and Johnson and them saw me. I got up again and nearly fell again."

You were talking, then, about the first time, weren't you, Mr. Smith?

A. No; heck, no. That's the second—that's the second—I think that's the third fall in there.

Q. You're talking about the third fall when you say, "I got up again and nearly fell again"?

A. No, I don't think that's right. I don't think that's right. When I fell the last time, after mashing the water out of them leaves—walking under them rocks—there was plenty rocks, don't worry. I slipped and I fell again. My feet slipped out from under me and I stayed there.

And then I come over there and then I wanted to go down to the crossing and go over, and they wanted to take me in the car, and they said, "No; we're going to help you across the track." I believe that's the way that thing reads.

Q. No, Mr. Smith, what kind of wire was it that you were talking about?

A. Bale wire.

Q. Was it circular? Was it joined together?

[fol. 247] A. Yep.

Q. Can you describe it?

A. Just bale wire, fastened together.

Q. It was all fastened together?

A. Yes.

Q. Now, it was after you got up from that, that you started walking again, and Baumberger and Delk kept walking on ahead of you?

A. I don't know—I think I pretty near died. That lick pretty well fixed me up. I think Baumberger and them wasn't too far from me. They was right there, pretty close. I don't know just how far it was, but it wasn't too far. That's when I got—I throwed the piece of wire off to the side just like I done the piece I got tangled up in there by that—when I first started off.

Q. They continued to walk ahead of you down to mile post 356?

A. That's when I went down and I seen them. They wasn't too far from me, and I just laid there. I was just absolutely—I was just about dead from the fall.

Q. Mr. Smith, isn't it true that at the time you fell the last time, they were already down at the mile post?

A. Heck—them—Mr. what's-his-name—if I remember right, they were down there; if I remember right, they were down there, Mr. Johnson and Mr. Clark. Pete and Delk [fol. 248] wasn't too far from me.

Q. It's your testimony they hadn't gotten down to the mile post at the time you fell?

A. I don't know where the mile post was. I wasn't looking. I was trying to catch up with them.

Q. How was the weather at the time this test was made, Mr. Smith?

A. Hot.

Q. Was it hotter than usual?

A. I don't know what the temperature was. I didn't have anything to test it with, but I know it was hot.

Q. As compared with an average summer day, was it warmer or cooler?

A. I don't know. I didn't have anything, Mr. Sullivan, to tell you how hot it was. I don't know, but I know it was hot.

Q. How about the ground? Was the ground wet or dry, Mr. Smith?

A. Dry, except where them bushes—except for them shoving them leaves over on them rocks. That's where I fell the last time there. You mean rain? Do you mean rain?

Q. Had it been raining? Was the ground underneath you wet?

A. I didn't see no rain nowheres.

Q. And how about the grass you had to walk through? [fol. 249] Was that wet?

A. Why, there's a certain amount of water in grass. There was grass there, too, but the things that got me was them gopherberry leaves, I believe.

But there was grass there, too. But the gopherberry leaves—

Q. Did you say there was water on the leaves that caused you to get your shoes wet?

A. When you walk on them leaves on the rocks, your foot is on top of that; that's water, and you slip. And that's where I went down the last time. Believe me, I was just about dead. I just laid there.

Q. Mr. Smith, from your observation did Mr. Clark fall?

A. Mr. Clark—heck, I ain't seen him fall. Him and Mr. Johnson was going just like that. They were really moving.

Q. How about Mr. Baumberger and Mr. Delk?

A. I told you they was walking slow in front of me.

Q. Mr. Clark and Mr. Johnson were walking fast, and Mr. Baumberger and Mr. Delk were walking slow?

A. That's right.

Q. Did either of them—

A. Mr. Johnson and Mr. Clark—they took off. They walked in the middle of the southbound main; the last time

[fol. 250] I saw them they were still in the middle of the track.

Q. Did either Mr. Baumberger or Mr. Delk fall, as far as you know?

A. I didn't see none of them fall.

Q. Whereabouts were you walking, Mr. Smith?

A. I told you I was walking in between the southbound main line and the side track.

Q. The others were walking in between the rails of one of the main tracks?

A. Southbound main track.

Q. Was there any ballast where you were walking, Mr. Smith?

A. Ballast?

Q. Ballast.

A. Rocks galore. That's all I know.

Q. Isn't ballast what they call the rock that they put under the tracks?

A. I don't know. All I know is rocks.

Q. Don't you know what ballast is, Mr. Smith?

A. I don't know. You could use sand for ballast, I guess. I don't know anything about that. I'm not a contractor and I don't know. All I know, there was rocks.

Q. Mr. Smith, on the main lines of the railroad, isn't it standard to have what you call rocks, and I call ballast, underneath the main tracks?

[fol. 251] A. I don't know what they call it, but it's rocks.

Q. Isn't it standard to have those rocks underneath the main tracks?

A. Well, according to the pictures they have them. I've seen them out there. They have it, yes, but I don't know how big those rocks are, and I don't know—you asked me the question once more. I don't know how big those rocks were.

Q. On these other occasions, Mr. Smith, when you had to go back under some emergency to protect the rear of the train, did you have to walk back on these rocks or ballast?

A. I tried to get off on the side and walk along the side. I don't like to walk on them rocks.

Q. There are places on the railroad where there aren't any passing tracks, aren't there, Mr. Smith?

A. But you can walk along on the edge down there.

Q. Aren't there places where you have to walk down the center of the track?

A. Are you talking about a drawbridge or something like that?

Q. Drawbridge or other places on the railroad where there's no road to walk off on the side.

A. Well, I don't know; there's a lot of places you can walk on the side, except where there's a trestle. I'd rather walk along in the ditch.

Q. Aren't there occasions where you'd have to walk down [fol. 252] in between the two rails of one of the main lines, Mr. Smith?

A. Several times—twice, to my knowin's.

Q. Mr. Smith, is one of your duties as a flagman to make a brake test of the train in Ft. Pierce?

A. That is correct, sir.

Q. What does that consist of, sir?

A. Well, the engineer sets up the brake and you go down the right-hand side of the train and see that the brake-shoes are up against the wheel, and you just keep on till you get up to the engine. Sometimes you can go through the baggage car and you don't have to go around them diesels, and sometimes the porter will open the door for you and you can go right—walk up to the front end of the car and see that the brakes are on there, come back and walk through there, cross through there. The porter will open the door and you don't have to walk around those diesels.

Q. Doesn't it consist of walking either down to the front of the engine or down to the baggage car on one side of the train, and then back on the other side?

A. That's right.

Q. Mr. Smith, have you ever requested or permitted any other employees to make brake tests for you when you were working as a flagman?

A. I was sick there one afternoon. I didn't feel good, [fol. 253] and I think George Hubanks, I believe, "walked the brakes" for me, if I remember right.

Q. Are there any other occasions when that's happened, Mr. Smith?

A. I don't know. I can't recall, but I think George did, and one occasion I believe, George did. And sometimes on

them long trains you take about 19 or 20 cars—I've done the same thing for other baggagemen when I was in the baggage car. I'd come down and get out of the baggage car and walk two or three cars so it wouldn't delay the train so much, and let him come through. He'd go back—then he'd go back the other way. I only done that to keep from delaying the train, to help him when the other guy was doing the flagging.

But George Hubanks walked the train for me one time there. I think it was seven or eight cars. I don't remember just what it was.

Q. Mr. Smith, after this accident, Dr. Nash treated you for a while, didn't he?

A. Yes, sir.

Q. And then you left him and went to Dr. Manson?

A. No, sir. He sent me up there.

Q. He sent you to Dr. Manson?

A. That's right.

Q. Then Dr. Manson got sick, did he not, sir?

A. Sir?

[fol. 254] Q. Dr. Manson got sick, didn't he?

A. That's right.

Q. Then Dr. Midkiff treated you.

A. That's right.

Q. Then you left Dr. Midkiff and went to Dr. Morgan.

A. I left Dr. Midkiff and went to Dr. Morgan.

Q. And you went to Dr. Morgan just a few months ago.

A. That's right. I went to Dr. Morgan just a few months ago.

Q. Now, Mr. Smith, are you still carried on the railroad seniority list?

A. That's right.

Q. You've been from time to time requesting extensions in getting a leave of absence so as to maintain your seniority isn't that right, sir?

A. But I haven't been able to work. There's a record laying right over there.

Mr. Frates: Mr. Smith, answer the question yes or no if you can, please, and if you can't, all right.

The Witness: Yes, sir. I haven't worked any since I got hurt. I haven't been able to work.

Mr. Sullivan: I have no further questions.
Mr. Frates: I have no further questions.
Mr. Sullivan: I'd like to ask you just one or two more questions. Is your right knee bothering you now?
[fol. 255] The Witness: No.
Mr. Sullivan: Just your left one?
The Witness: No, sir; I can kick you out of the door. Look at here (Indicating). This is where the trouble is. It's in awful shape, if you want to know the truth of it. That knee is all right. This is the knee.
Mr. Sullivan: No further questions.

(Witness excused.)

Mr. Frates: Mr. Clark, would you take the stand, please?

Thereupon—

C. T. Clark was called as a witness in behalf of the Plaintiff, and having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Frates:

Q. Will you tell the jury what the average monthly wage is of the trainmen on the seniority list, of the place that Mr. Smith had on that seniority list, what they make on an average a month?
A. I'm sorry, Mr. Frates. I honestly don't know. There's been so many changes in them, and there has been for the last three years, I haven't tried to keep up with it.
Q. Can you give us an approximate figure, Mr. Clark? I know there's been a lot of changing, and I know it's very [fol. 256] technical.
A. Well, I'd think—I'd say a man who worked the entire month, the way the jobs are advertised on the mileage basis, he should make between 450 and 500 a month, sir.

Mr. Sullivan: Is that net or gross, Mr.—
The Witness: That's gross.
The Court: Anything further of Mr. Clark?

Mr. Frates: No, your Honor.
Mr. Sullivan: No, sir.

(Witness excused.)

The Court: We will take a short recess.

(Thereupon a short recess was taken, after which the following proceedings were had:)

Mr. Frates: Judge, I have the mortality table and I assume Mr. Sullivan and I can agree on that—and this one regulation of the Public Utility Commission, and I'm going to rest.

The Court: Is there any objection to this offer?
Mr. Sullivan: No, sir.
The Court: Bring the jury in.

Mr. Frates: Your Honor, we have agreed on this mortality table, which shows that a man the age of 63 has 14.1 years to live. In other words, this is a general average, but a person of the age of 63 has 14.1 years to live.

Offer in Evidence

At this time, Your Honor, we'd like to introduce in evidence a certified copy of the regulations of the Florida [fol. 257] Railroad and Public Utilities Commission relative to obstructions and conditions adjacent to tracks, and the certificate is to the effect that it's certified, as shown on the records of the Florida Railroad and Public Utilities Commission. And it's signed by the Executive Secretary, with their seal.

We want to introduce in evidence this Rule 6.

And with that, the plaintiff will rest, your Honor. We have nothing further.

Mr. Sullivan: We have no objection, your Honor.

Plaintiff Rests

The Court: All right. We will mark it as a plaintiff's exhibit in evidence, and note the plaintiff has now rested.

(The document referred to was thereupon marked, "Plaintiff's Exhibit No. 5.")

Mr. Frates: May I read this one section, your Honor? This is two lines.

Gentlemen, this is the rules and regulations of the Florida Railroad and Public Utilities Commission which govern railroads, and this is applicable to railroads: "Rule 6. Rule 6.1. The space between such tracks as are ordinarily used by train and yardmen and other employees in the discharge of their duties, and the space beside such tracks within eight (8) feet of the center line thereof, shall be kept clear of grass, weed, mud, slime, debris and similar obstacles."

The plaintiff rests, your Honor.

[fol. 258] The Court: Go ahead, Mr. Sullivan.

Mr. Sullivan: Your Honor, there are certain matters I could probably take up before the Court, but if I could take those—

Mr. Frates: I will stipulate.

Thereupon—

CLAUDE D. HOLMES, JR., M.D., was called as a witness in behalf of the Defendant, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sullivan:

Q. Doctor, would you state your name, please?

A. Yes; I'm Dr. Claude D. Holmes, Jr. I do orthopedic surgery.

Q. Do you practice here in Miami, sir?

A. Yes; 2757 Southwest 22nd Street.

Q. Doctor, I wonder if for the record you could tell us about your medical education, any postgraduate training you might have?

A. Yes. I graduated from Indiana University School of Medicine in 1944. I had an orthopedic residency training consisting of three years.

Mr. Frates: I'll stipulate the doctor is a qualified orthopedic specialist, to save time.

Mr. Sullivan: All right; thank you.

[fol. 259] By Mr. Sullivan:

Q. Doctor, orthopedic surgery is related to bones, joints and related tissues, in the main. Is that a good layman's definition of it?

A. That's correct.

Q. Doctor, from time to time have you been appointed by judges in the local Circuit and Federal court as a court-appointed physician to examine plaintiffs in the various cases?

A. Yes, sir.

Q. And you were so appointed in this case, I believe?

A. I believe that's correct.

Mr. Frates: Your Honor, I think that that is a little misleading. He was appointed by the Court on the motion of the defendant railroad to appoint someone, and in fact, we agreed on Dr. Holmes. But I mean, he is not the Court's doctor, and I think the jury ought to be so advised.

The Court: I will advise them in my charge, the nature of a court-appointed physician. Let's go ahead.

By Mr. Sullivan:

Q. Doctor, have you examined Mr. Bert Smith?

A. Yes, sir.

Q. When did you examine him?

A. I examined him the 20th of June, 1957.

Q. At that time did you take a history from him, sir?

[fol. 260] A. Yes, I did.

Q. Will you tell us about that, Doctor?

A. At the time of his examination he was complaining of pain in his left knee when he was walking or weight-bearing. The rest of his history indicated that on the 13th of September, 1956, while he was working for the railroad and walking along, he tripped over some wires, and a short time later, that is, a few days later, he tripped over some bushes.

And each time he fell he landed on his bent, left knee. He had much pain in the knee at that time. He went to see a Dr. Nash for treatment. By that evening his knee had become very swollen. He was admitted to Victoria

Hospital and was discharged about two or three days later.

He used heat soaks on his knee, but his swelling didn't go down. About three weeks later he went to see Dr. Manson. Following this his swelling went down slowly. Dr. Manson became ill, so the patient was cared for by Dr. Midkiff.

Finally, in January of 1957 he went to St. Augustine where he was seen by Dr. Lockwood. At this time he said his knee was blue, was puffed up and was sore and it hurt him to walk on it. It didn't hurt him, particularly, to stand on it at that time.

Again, he was treated by Dr. Midkiff in this community. Then for a period of about five weeks he didn't see any doctor, and then he went to see a Dr. C. Russell Morgan, [fol. 261] where he was told that he had damage to his knee.

At the time of my examination he stated he was still seeing Dr. Morgan. He had pills for his discomfort, and he used heat applications. That's been his only treatment.

At the time I saw him he stated he had no trouble with his knee, except when he stood on it or walked on it. At that time his knee would crack and it would pop and hurt when he walked on it. His pain was relieved as soon as he got off and took the weight off of his foot. The swelling was also present, but it got worse when he walked. He said his complaints were gradually getting worse.

He stated that in May of '56 he was in the hospital in St. Augustine for about six weeks, at which time he had uremic poisoning of the kidneys, gout and arthritis. He also stated that Dr. Nash had treated him for arthritis of both knees two to three years before he got hurt.

At that time he had some Meticorten pills which helped him. He said he also hurt his right knee a few times in the past, his left knee that he was complaining about now.

Q. Did you make an examination of him?

A. Yes.

Q. Can you tell us about that, Doctor?

A. He has a considerable degree of limitation of motion in his knee. That is, it's probably—it runs from 150

to 80 degrees, and ordinarily should run from 180 to about [fol. 262] 35 or 40 degrees.

Mr. Frates: In his knee; did you say his knee, or are you talking about one or the left or the right?

The Witness: About his left knee.

Mr. Frates: I'm sorry. That's what I thought.

The Witness: This is the left knee.

Mr. Frates: All right, sir.

The Witness: He weighs about 250 pounds and he's about five feet seven inches tall. There was some vascular discoloration of a mild degree about the knee. This is similar to what you see about ulcers—a brownish discoloration, somewhat blue in nature.

On stress test he had some pain produced in the knee. There was a cracking sound made in both knees when he moved them. It sounds like marbles rolling around inside the knee joint. This is present in both his knees. It's a little worse in the left than it is in his right.

Twisting tests, turning the knee and rotating it produced discomfort. The patient also has a moderate degree of bowlegs, and at that time he was walking with a limp and used a cane for support. He had—do you want the X-ray?

By Mr. Sullivan:

Q. Yes, sir; I was going to ask you if you took X-rays.

A. Yes, I X-rayed his left knee, and these X-rays revealed that he had a very considerable degree of hyper- [fol. 263] trophic arthritis, which was an overgrowth kind that comes on with age and use, and also, he has a very severe cartilage degeneration on the outside half of his knee joint.

Q. Doctor, there's a shadow box up on the wall, if you want to use that to explain the X-rays.

A. This is the patient's left knee, and this is the little bone that's on the outside here (indicating). You can feel this, so this will identify the size of the knee if you—the medial side of his knee joint here demonstrates that there is a very considerable narrowing in the joint space. This is a fairly normal joint space, perhaps a little wide, but it should look similar to this on this side.

Also, there are little points of arthritis sticking up here. This area was irregular on both sides. It's overgrown on this side. These are all indicative changes of a long-standing chronic type of arthritis in the knee joint.

This is a side view. This is the kneecap, which you see sticking up. The kneecap also has very little space beneath it. The joint spaces are very narrow. There are many chronic changes here with excessive bone growth and all of these lumps that you see here. This type of arthritis represents a long-standing degenerative type of arthritis involving the cartilage in the knee joint. This space is not actually space. This is filled with the cartilage like you see on a hambone when you open it up. If you take that [fol. 264] cartilage off and make an X-ray, it closes together like this.

So most of the hams you eat got a lot of cartilage on them, so they'd look this way. And when the cartilage is gone, and you develop arthritis, this space closes together. But this process develops over a long period of time.

Q. Dr. Holmes, were you able to examine X-rays taken shortly after this injury to Bert Smith?

A. Yes, I have a set of X-rays here which are labeled, "Dr. S. Robert Nash," and were taken 9-17-56. These are labeled, "The left knee." I think you can see through that—it isn't quite clear.

Mr. Frates: Doctor, may I ask you a question? Isn't that a very poor X-ray?

The Witness: It could be much lighter and better seen, yes.

Mr. Frates: These X-rays are just like pictures, are they not? Sometimes you have difficulty, without making any reflection on anyone—that's not a very good picture, is it?

The Witness: No, sir. You can see, even the jury, I think, can see there's a space present here which is not here. It's pretty difficult, unless you get a pretty powerful light to see all the little changes I showed you on this other film. This is a better picture. You can see several [fol. 265] of the arthritic changes which are present here. This is all hypertrophic arthritic changes. We know from

experience from a lot of these, if you operate on these knees and look at them, they look a lot worse than they do on the X-ray.

But these will indicate that as near as you can tell from these, there hasn't been a great deal of change between this set of films which was made in September of '56, and the ones which are made in January, '57. However, that's been three months.

By Mr. Sullivan:

Q. Doctor, what significance would that fact have, that the X-rays are just about the same?

Mr. Frates: He didn't say that. He said there hadn't been a great deal of change.

Mr. Sullivan: Wait a minute. I'd like to ask the question. If there's an objection to it, your Honor—

Mr. Frates: Your Honor, if Mr. Sullivan is going to ask a question and—

Mr. Sullivan: I think there ought to be an objection, and your Honor rule on it.

Mr. Frates: I've objected, and ask him to use the testimony.

The Court: I note the objection, and request you rephrase the last question.

By Mr. Sullivan:

Q. Doctor, what was your statement as to the difference, if any, between the X-rays taken in September and [fol. 266] those that you took?

A. I don't remember exactly what I said, but the impression that I'm trying to give is that there has not been much change between the two sets of films.

Q. Using your phrase, there's not been much change, of what significance is that factor?

A. This has been a relatively short period for arthritic changes. However, if there had been a great deal of change occur in that period of time, one would be much more likely to assume that the stress and strain or precipitant injury had produced more effect on the bone than you would find

if there had not been much change. In other words, this is a chronic lesion.

Q. Dr. Holmes, I want to ask you, you said earlier that some of the cartilage in Mr. Smith's knee was gone?

A. Yes.

Q. Now, exactly what is the cartilage and what function does that have in the operation of the knee?

A. Well, cartilage is a lining for the joints. As I said, I can use the old ham illustration again. It's the smooth mechanism which allows the joint to glide freely and without any trouble, and it is elastic and resilient and provides a cushioning mechanism which is lubricated by joint fluid to provide smooth operation in the joint. When this disappears or becomes rough, then the joint gives pain.

[fol. 267] Q. Can you, from the X-rays, determine whether cartilage is present or absent?

A. You can deduce by inference; that is, if the space that I showed you a while ago is not present on the film and it should be there, because cartilage fills that space, and if that space is not present the cartilage has disappeared.

Q. Then, Doctor, going back to a comparison of the two sets of X-rays, was the presence or absence of the cartilage about the same in September as it is now?

A. It would appear to be so, yes.

Q. What significance would that have in terms of correlating this accident—the presence or absence of cartilage?

A. Well, this type of arthritis and injury—not injury—this type of arthritis which he demonstrates is a type of injury which develops over a long period of time. Like the arthritis your grandmother gets, it takes a long period of years for it to develop.

Now, the question of changes between these two sets of films—the only thing that you can conclude from that is the rapidity with which it is getting worse on an X-ray basis. If there were a lot of change it would be progressing very rapidly.

Q. Now, Doctor, did you reach an opinion as to connection, if any, between Mr. Smith's accident or falls in September of last year, and his present complaints?

[fol. 268] A. Well, number 1, he's had this degree of arthritis for some period of time. He has had some treatment for it, according to his history, two or three years ago. He states he's been able to work right along with it. Some precipitant injury sometimes of a minor nature, will occasionally give you increased pain and discomfort with this type of arthritis.

I frequently like to compare a little bit to a tire on an automobile which is worn very thin, and is bulging. It takes only a small stone in the road or a bump to blow out the tire. Now, the stone in the road with a good tire wouldn't give you trouble. It wouldn't blow out the tire. But if the tire is already well worn and you run over a small bump, it blows out the tire and then the tire is no good.

But the fact that the tire was already worn out beforehand is the factor which we have here; that is, this knee was well worn out before he had the falls, and since he's had the falls he hasn't been able to get along and work with it, if that answers your question.

Q. Does Mr. Smith suffer from an overweight condition, sir?

A. Well, he's rather overweight, yes.

Q. What effect, if any, does that have on his arthritic complaints?

A. Well, coupled with a moderate degree of bowlegs [fol. 269] which he has, in excessive weight this type of condition can produce this type of arthritis over a long period of years; it produces too much stress and strain on one side of the knee joint. Again, this is like tires on a car that are out of line. They'll wear disproportionately.

Q. Doctor, I think earlier in the history Bert Smith gave you, he said that his complaint was that he was gradually getting worse?

A. Yes, that's one of the things.

Q. To what do you attribute that?

A. Well, this type of condition will just always get worse. It can't get any better, and the worse it gets the faster it gets worse. It's like two very rough surfaces that rub together. The more they rub the worse they wear each other and pretty soon you don't have anything left at all.

This type of condition chronically gets worse and it continues to do that.

Q. Dr. Holmes, are you able to give an opinion as to Bert Smith's present condition, and is it possible, sir, in effect, to separate what he would have had, anyway, and the effects of this fall or falls in September of last year? Is there any way you can?

A. Well, that would be difficult to say specifically, in regard to his particular case. But generally, at some time this type of arthritis will produce an incapacity where [fol. 270] you can't work with it.

In some people it lasts longer than others. In some people it happens in a relatively short time. With some precipitant injury like he had, it's likely to come on a little sooner than if he had not had the injury.

Q. Do you think he's able to work at the present time, sir, considering that he had been a flagman before?

A. Well, I doubt he could, but apparently he did before. He apparently was doing it. I don't think he can now.

Mr. Sullivan: Thank you, Doctor.

Cross examination.

By Mr. Frates:

Q. Doctor, we'll try to cover this very quickly. Your testimony boils down, as I see it, sir—and see if I'm right—that actually, he had the arthritis, the osteoarthritis in both legs or knees. Let's just refer to the knees.

A. I presume he had it in his right knee. I know he had it in the left.

Q. Did you take any X-rays of his right knee?

A. No, sir.

Q. Those films which were taken a few days after this accident which occurred September the 13th, 1956, as you said, were not the best films.

A. One of them was. The other one was all right.

Q. Can I see one of your films, sir?

[fol. 271] A. Yes, sir.

Q. And X-rays, at the best, are merely an aid to you,

are they not? As you said, when you get in there, sometimes you see things a little differently.

A. That's right.

Q. So they're merely an aid to help you in determining whether or not there has been any change, and things of that nature. But you, in your experience, have found where they look like the same and you got in there, and it looked much worse than you thought from the X-ray.

A. These usually look worse when you get inside them.

Q. Now, an X-ray only shows the bone, doesn't it? In other words, this, I assume, is the dark tissue of the nerves and ligaments and things of that nature?

A. Yes.

Q. But you don't use that in diagnosing what's wrong with those, do you?

A. Sometimes, but generally, these films were made for bone details.

Q. In other words, it's a limited restriction?

A. Yes.

Q. Now, your knee joint is supported by muscles and ligaments and things of that nature, is it not, sir?

A. Yes.

[fol. 272] Q. In other words, that holds us together.

A. That's right.

Q. Now, if you have arthritis in your knee and you fell on your left knee and injured these ligaments, and that's what you do when you fall and strike a blow, do you not?

A. Yes.

Q. To some degree or another, you injure that area. That would make the stress and strain much greater on the bone, wouldn't it, if you had injured and weakened the ligaments and muscles that support that knee?

A. Yes, that's right.

Q. Is that correct, sir?

A. Yes.

Q. So if in a case where a man had fallen on the road bed and hit his knee two or three times, his left knee, you would expect that to aggravate a condition, an osteoarthritis condition, would you not, in the normal course of events?

A. Yes, I think that's generally true.

Q. And, of course, it doesn't cause it, but it makes it worse, as I think you've said.

A. That's right.

Q. You also said that an injury in what you doctors call, I think, a trauma or a blow, would cause this to get worse quicker, wouldn't it?

A. It can.

[fol. 273] Q. I beg pardon?

A. It can do that.

Q. That's medically consistent and normal, in your experience, isn't it?

A. That's right.

Q. That if I have arthritis in this knee, and hit it or it suffers an injury, then that will cause that arthritis to get progressively worse quicker than it normally would have.

A. Yes.

Q. Now, arthritis, I think you said, causes pain, does it not, on some occasions?

A. Yes.

Q. Now, we can have arthritis, can we not, Doctor, and not even know about it until we get a blow, and then that causes the pain to—

A. It depends on the kind of arthritis, but that's possible.

Q. But arthritis—osteoarthritis, too—

A. The only point I was making about this gentleman's knee is, with the amount he has I don't see how he could have gotten away without having some pain.

Q. He did have pain; the record shows that, but when you have pain, a condition like that—a blow or trauma makes that pain worse, doesn't it?

A. Yes.

[fol. 274] Q. It's the old story, it's easier to hurt something that's not as strong or not as susceptible to the rigors of everyday life as a good knee.

A. That's right.

Q. I think you also said that that would bring about the change and cause him to—his disability, whether it's occupational or what it is, due to his limitation—bring it about

quicker than it would if he had not suffered a blow or trauma to the knee.

A. Yes.

Q. Thank you, Doctor. You are the court-appointed doctor, are you not, sir?

A. That's right.

Mr. Frates: Thank you very much.

The Court: Mr. Sullivan, any other questions of the doctor?

Mr. Sullivan: No, sir.

The Court: Do you want to put these X-rays in evidence?

Mr. Sullivan: I wasn't planning to.

Mr. Frates: I think we ought to, for the jury to see them.

The Court: All right. Mark them, Mr. Clerk.

(Witness excused.)

(The X-rays referred to were thereupon marked, "De-[fol. 275] fendant's Exhibit B.")

The Court: Make a note in the record that we can return Dr. Holmes' X-rays to him at the completion of the trial.

To the members of the trial jury—

Mr. Frates: Excuse me, Judge. I know you've had a very hectic week. I'm aware of that, and I know we all want to get this case concluded, and I think we all regret that we haven't gone faster than we have. But I'm just wondering if your Honor and Mr. Sullivan and the jury would consider going on with some of the witnesses he has so we won't find ourselves working tomorrow afternoon. I think it would be bad enough to have to work tomorrow morning, but I think if we could get away from here tomorrow afternoon—

The Court: I'm agreeable, if the jury doesn't have any problems in working a little longer; I'm not unduly hungry yet, or anything.

Mr. Frates: I'm willing to do whatever your Honor wants to, but if we could work a little longer we could wind up in the morning and have the afternoon free.

Mr. Sullivan: Your Honor, I'm running out of gas at this hour.

The Court: Let's proceed for a little while, gentlemen.

[fol. 276] Thereupon—

HARRY WOLFF was called as a witness in behalf of the Defendant, and having been first duly sworn, was examined and testified as follows:

Mr. Frates: I will stipulate he's the official photographer for the Florida East Coast Railroad, and an excellent photographer; one of the best, he is.

Mr. Sullivan: Do you further stipulate his name is Harry Wolff?

Mr. Frates: Yes.

Direct examination.

By Mr. Sullivan:

Q. Mr. Wolff, last summer did you have occasion in connection with your duties as a photographer, to travel the entire length of the railroad taking pictures at each mile post?

A. Yes, I did.

Q. Could you just state how those pictures were taken, sir?

A. Well, when—

Q. If you could tell us when you started and when you finished—

Mr. Frates: Mr. Sullivan, if you tell us what you have, I might stipulate to it and we'll save ourselves a half hour.

[fol. 277] Mr. Sullivan: Mr. Wolff will have to fill me in on the dates, but I think it was sometime in July last year.

By Mr. Sullivan:

Q. When did you finish, Mr. Wolff?

A. Between the 26th or 27th of June to the 15th of July I made a trip from Jacksonville to Miami on a motor car,

made four pictures at every mile, plus the bridges that there was.

Mr. Frates: Do you want to introduce those?

Mr. Sullivan: That's right.

Mr. Frates: What pictures? For the whole railroad? Did you check to see if the weeds were the same?

Mr. Sullivan: Your Honor, I have here the pictures Mr. Wolff took. He took at each mile post, two looking north and two looking south. It was in connection with an Interstate Commerce Commission proceeding, and also photographs taken at the 355 and 356 mile posts, which are slight enlargements of those I plan to introduce.

Mr. Frates: Those were taken in June, your Honor. I don't think those are proper. I don't think they reflect the scene at the time that the accident occurred, because obviously, it's a changing scene.

I'd like to ask Mr. Wolff, myself, if they took any pictures around the time that this accident occurred, around September.

[fol. 278] Mr. Sullivan: We have some other pictures not taken by Mr. Wolff, your Honor, that we're planning to introduce.

Mr. Frates: I think if we have pictures in the proximity to the time this accident happened, I think those pictures ought to be used, and I object to the introduction of any pictures which were taken in June, some several months—particularly, in view of the fact that the railroad has pictures which show the area which is involved in this case.

By Mr. Sullivan:

Q. Mr. Wolff, when were the pictures that these 355 and 356 mile posts show, taken? Do you have your notes on that?

A. I have a note in my pocket, if I can look at it.

Mr. Frates: Just approximately.

The Witness: I believe it was July 13 a year ago, yes, it was Friday, July the 13th.

Mr. Frates: When were the pictures that were taken—

The Court: Is he finished? I won't rule on it until you've

had a chance to cross examine. Are you offering both the book and the photographs?

Mr. Sullivan: Yes, sir.

The Court: Do you want to question him any further? I will reserve on it until the cross examination.

By Mr. Sullivan:

Q. Mr. Wolff, do the various photographs in here thoroughly and accurately represent the scenes shown in each of the pictures?

[fol. 279] Mr. Frates: I'll stipulate that the pictures actually represented those taken in July of the areas; it was in July.

Mr. Sullivan: Your Honor, we introduce them as evidence of what the condition was beginning in June, and wherever Mr. Wolff ended up, and as to these particular pictures, at 355 and 356 mile post—introduce them, purporting them to represent the condition as it was on July 16, was it, Mr. Wolff?

The Witness: July 13.

Mr. Frates: Your Honor, I will agree that the book—other than whether it's material or relevant—I have no particular objection to it, other than I've never seen a procedure where no one has identified the pictures as being approximately the same as the area was where this accident occurred on September 13th, 1956. I concede that you can't run out there and take it on the 12th or the 14th, but no one has identified these pictures as being a reasonable facsimile, plus the fact that I'd like to know when these other pictures that they have taken—and if they're in closer time, then those are the ones that the jury ought to be able to see.

OFFERS IN EVIDENCE

Mr. Sullivan: Your Honor, what we're doing is offering these in evidence now. Such other exhibits, we'll get to.

Mr. Frates: I don't think these are admissible. I don't think it's at any time admissible to show something that [fol. 280] doesn't accurately portray it, particularly if you have something else more closely in line. I think Mr. Wolff

will agree with me that in two months, rocks and weeds and things—

The Court: I will sustain the objection presently to the offer.

Mr. Sullivan: Can we have these marked at the present time?

The Court: Yes. Mark them as defendant's exhibits for identification.

(The photographs referred to were thereupon marked "Defendant's Exhibits A1 and A2 for Identification.")

Mr. Sullivan: I have no further questions of Mr. Wolff.

The Court: Any further questions of Mr. Wolff?

Mr. Frates: No, sir.

(Witness excused.)

Mr. Sullivan: I have no objection to your reading Dr. Manson's deposition if he's not available.

The Court: We will admit the deposition, since the doctor is not available to testify.

Mr. Frates: He's had a heart attack.

Mr. Sullivan: May I explain, your Honor?

The Court: Yes.

Mr. Sullivan: Gentlemen, under the rules of procedure, [fol. 281] what you can do is, before trial take the testimony of a witness and if, for any reason, he's unavailable, use the testimony you've taken before trial as evidence in the trial.

Dr. Manson treated Mr. Smith for a period of time, and had a heart attack. He is not presently able to come to court, and so we're going to read to you the questions and answers from his testimony that was taken before. Mr. Frates will read the answers that the doctor gave on questions that were asked of him before.

The deposition of

P. J. MANSON, M.D. was thereupon read to the jury as follows:

Direct examination.

By Mr. Sullivan:

"Q. What is your name, sir?

"A. P. J. Manson.

"Q. And you are a medical doctor practicing here in Miami?

"A. Yes, licensed to practice in the State of Florida since 1925.

"Q. Would you state for the record, sir, your medical education.

"A. Well, after obtaining my B.S. degree I went to medical school and got my M.D. at the University of Georgia in 1922. I served a one-year internship in Savannah. I served four months of residency at Jackson Memorial Hospital.

[fol. 282] I belong to the usual medical associations, the Dade County, Florida, Southern and American Medical Association. I belong to the Southeastern Surgical Congress, the Miami Orthopedic Society and the Florida Orthopedic Society.

"Q. Do you limit your practice, Dr. Manson, to any medical specialty?

"A. Yes. I limit my work to orthopedic surgery.

"Q. Would you define that for me, please?

"A. That's the practice limited to bones and joints, their injuries and diseases.

"Q. For how long have you specialized in that area, sir?

"A. About eleven years now.

"Q. And prior to that?

"A. Before that I did general practice, general surgery and orthopedics. I have been on the orthopedic staff of Jackson Memorial Hospital for about twenty-eight years and have been in charge of one of the

orthopedic services for three months each year since the beginning of World War II.

"Q. I wanted to ask you, Doctor, about your treatment of a man named Bert Smith."

Mr. Sullivan: Your Honor, there are certain complaints Mr. Smith had that I don't think are related to this fall. I was preparing to skip that unless you want to read that. [fol. 283] Mr. Frates: It's all right, whatever you want to skip, sir. What page do you want?

Mr. Sullivan: The bottom of page 5, beginning, "The next time I saw . . ."

"A. . . . The next time I saw him was March 19, 1956. That was in regard to treating him for arthritis. He gave a history of having arthritis of the left knee, which had been very bad for the past two weeks. The condition had become worse.

"Examination revealed a fluctuating area over the anterior medial side of the knee, and the knee was injected with novocain and one cc. of hydrocortone.

"I have another card on Mr. Smith when I treated him for an injury which he sustained in an automobile accident on March 24, 1954."

Mr. Sullivan: Your Honor, I think we might as well skip that. That isn't germane to this case at all. On the top of page 8, "The next notation, I think, was some time in March or April of 1956."

Mr. Frates: By skipping, we're giving a distorted view of it.

Mr. Sullivan: At the top of page 8, "Some time in March or April of 1956."

Mr. Frates: You're going right back to the same date we've already read, Mr. Sullivan.

[fol. 284] Mr. Sullivan: I was trying to skip the '54 treatment.

"A. Yes. That was March 19, 1956, at which time he stated that he had some arthritis in the left knee and that for the past two weeks it had been worse.

"Q. I think earlier, Dr. Manson—correct me if I am wrong—you used the word "fluctuating."

"A. Yes.

"Q. Will you explain that, sir?

"A. There was a tender fluctuating area over the anterior medial side of the knee. A fluctuating area is a soft area which bounces around when you finger it or palpate it. In other words, you push on one side of the knee and you can feel the vibrations on the other side of the knee. That means that there is fluid in there, or water. You push it down one place and it jumps out in another.

"Q. What would that result from? More specifically, from what did that result in this case?

"A. It was due to an arthritis in his knee.

"Q. Your treatment consisted on that occasion of what, sir?

"A. Injection with hydrocortone. That's a product of the family of cortisone.

"Q. Did you treat him over a period of time or just on that one occasion for the complaints that he had?

"A. No. He was in again on the 22nd, and this pro- [fol. 285] cedure was repeated—that is, injection was repeated.

"I saw him again on the 26th, but on the 22nd he was complaining of pain localized over the medial side of the knee. He stated that the injection which I had given him on the 19th cured the other tenderness over the anterior medial side of the knee.

"Q. Was this all the left knee, Dr. Manson?

"A. This was the left knee, yes. On the 26th he stated that the injection of hydrocortone made his knee extremely sore and it was necessary to skip one day's work. He was advised to continue with the cordex tablets, which I had prescribed for him. Again, there was some cortisone in these tablets. These were the tablets that had been prescribed by Dr. Nash.

"Q. What is the next date that you have down there?

"A. On May 9, 1956, another injection of Compound F, or hydrocortone. Then on 5/14/56, he was still complaining of pain over the anterior medial aspect

of the left knee. He was given hot packs and ultra sound.

"He stated he had lost time from work because of the pain. He complained at that time that pain was relieved when he was off of his feet. He was given a prescription of hasacode tablets for pain at that time.

"Q. Did you see him again for that same complaint?

"A. The next time I saw him was November 9, 1956. [fol. 286] He was complaining of a swollen area in the left knee. He stated that he fell on September 13 and was treated by Dr. Nash. He was hospitalized at Victoria Hospital for two days, and has been at home since.

"Examination revealed a swollen, tender area over the anterior medial aspect of the left knee. The diagnosis was severe bruise, superimposed upon pre-existing arthritic knee.

"Q. What was your treatment at that time, Doctor?

"A. He was advised to continue using heat at home and was advised to take one medicortone tablet three times daily. I do not know where he got the medicortone tablets. I do not know whether I prescribed them or whether they had been prescribed by Dr. Nash.

"Q. Was that the last time you saw him, sir?

"A. No. I have seen him numbers of times since then. I gave him 40 units of ACTH injection. That's another cousin of the cortisone family. I gave him another injection on the 21st of November. At that time Dr. Midkiff saw him and recorded his weight at two hundred and sixty-eight and a half pounds.

"Q. Have you been treating him since that time, sir?

"A. That's the last notation that I have of any treatment that I gave him. Dr. Midkiff treated him on numerous occasions after November 21, 1956. He was treating him at that time that I had my heart attack on January 2, 1957.

[fol. 287] "Q. Dr. Manson, going back to March of 1956, I believe, when Bert Smith came in with the complaint about his knee, did you take any X-rays of the knee at that time or subsequent to that time?

"A. We do not have any X-rays on his knee.

"Q. Dr. Manson, as to this arthritic condition for which you treated Bert Smith in the early part of 1956, the spring of 1956, do you have an opinion, sir as to the origin of that, the causes of it?

"A. No, I wouldn't have any information as to what caused the arthritis in his knee except that usually people who are as stout as he is would be expected to have more arthritic changes at his age than the average person.

"Q. What would be the reason for that, sir?

"A. Well, it's probably due to excessive eating, which also caused his weight to increase, and just an excessive amount of work that his body has to do in order to absorb all of the food that he eats.

"Q. Do you have an opinion, sir, as to whether or not the fact that Bert Smith is overweight or the fact that he is heavy would have an effect on further development of his arthritic condition?

"A. Definitely, yes. I might add that his being overweight, carrying this extra weight, puts an increased burden on his knees to carry this extra weight. This [fol. 288] is weight that the normal person does not have to carry. You can naturally expect his knees to become more arthritic faster because of the excessive weight that he is carrying.

"Q. The fact that this joint has to bear a certain amount of weight or a more than average amount of weight would have a tendency to increase the amount of arthritis in that joint?

"A. Yes, that's right. It's just like if this man had a hundred and twenty-five pounds of weight on his back, carrying it around all the time. You can imagine what that would do to your knees if you were carrying around one hundred and twenty-five pounds on your back all the time."

Mr. Sullivan: That's all, sir.

The Court: To the members of the trial jury, we will go into recess at this time and we will reconvene here in this courtroom tomorrow morning at 9 o'clock.

I repeat my instructions to you which I made earlier that you are not to discuss the case among yourselves or with any other persons or parties. You are not to dwell on any particular portion or portions of the testimony until you've had the opportunity of hearing it all. After you have had the opportunity of hearing it all, and the closing arguments of the counsel, you will have the opportunity to have a full, fair and impartial deliberation among yourselves.

Are there any requests for any further instructions?

[fol. 289] Mr. Frates: No, your Honor.

Mr. Sullivan: No, your Honor.

The Court: We will reconvene at 9 o'clock tomorrow morning.

Court is in recess.

[fol. 290]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

At Law, No. 38384-L

[Title omitted]

Transcript of Trial—Saturday, July 27, 1957

Miami, Florida

[fol. 291]

DEFENDANTS' MOTION FOR A DIRECTED VERDICT

Thereupon—

Mr. Sullivan: Your Honor, there are several matters I'd like to take up before the jury comes in.

I'd like to make this motion at this time. At the close of the plaintiff's case the defendant moves the Court to direct a verdict on the following grounds:

(1) Under the evidence adduced at the trial there is no evidence of negligence on the part of the defendant.

(2) Under the evidence adduced at the trial here there is no evidence of negligence on the part of the defendant that caused or contributed to the injuries complained of.

(3) It affirmatively appears from the evidence adduced in this cause that the sole, proximate cause of the injuries complained of is the negligence of the plaintiff, Bert Smith.

(4) It affirmatively appears from the evidence adduced in this cause that the plaintiff was guilty of negligence that caused or contributed to the injuries complained of.

(Thereupon counsel for the defendant argued to the Court.)

The Court: Will the record note the motion, and I will reserve ruling on the same at this time and will proceed to complete the defendant's testimony, with the desire [fol. 292] to consider this more fully at the end of all the testimony.

MOTION TO DISMISS, ETC. AND RULING THEREON

Mr. Sullivan: Your Honor, at the same time I'd like to make at this time a motion to dismiss all the allegations of the Complaint that pertain to the right to give a field test or the circumstances under which it was given, on the grounds that the Court lacks jurisdiction over that; that that's simply a labor matter covered by a separate statute.

It is not a common-law or Federal Employers Liability Act case. It is not incorporated within the scope of such a case, and it is under this federal statute.

In addition, we'd like to move the Court to strike all the testimony about the actual test and the circumstances under which it was given; that is, where Mr. Bert Smith was made to walk, and his testimony and the testimony of other witnesses concerning the condition of the right of way that day.

We'd like to move to strike all the other testimony pertaining to whether or not they're entitled to give a test

like this, whether or not such test has ever been given before. We feel it isn't a matter for this Court. It's a labor matter covered by federal statute.

Mr. Frates: Your Honor, I know your Honor will reserve ruling, but since he's laboring this issue of the labor —I don't know where Mr. Sullivan gets this idea. If somebody does something wrong or they're negligent or careless as a result of someone getting hurt, that's a tort and [fol. 293] we're confronted with that now—not reinstatement or whether or not he could have refused to take the test. That's a labor matter. We're not discussing that.

If somebody took a gun to Mr. Sullivan and made him go out and walk until he dropped, and as a result of that he suffered a heart attack, that's a tort. That's what we contend now. It was an unlawful and unauthorized test, and as a result of the test, knowing his physical condition, he injured his knee and leg, and that's what we're here for.

Certainly, that's a factor that's involved in whether or not they were negligent, whether or not that was improper. Just because it's a shade of different doesn't seem to me to get it over in the realm of labor. In answer to that it's a labor matter, what matter? The Labor Board doesn't award damages for injuries for negligence. They have no jurisdiction over this case because there's nothing they can do about it.

The Court: I thought the question he raised was whether or not it was unauthorized.

Mr. Frates: Because I think, your Honor, that an unauthorized act, a wrongful act, if this was wrongful or unauthorized—or the jury could believe that this was an intentional act on their part to injure Smith—if they could draw an inference from it, that their conduct was such, knowing his physical condition that this was an intentional [fol. 294] act which resulted in his injury.

Now, I call your Honor's attention to the statute which says that the negligence of the railroad or its agents in whole or in part—it's much broader and the Supreme Court of the United States says it's much broader than the normal negligence case, and if they do anything that's wrong or negligent—and I contend that it's just as careless or just as negligent for them to order somebody out to do some-

thing, an unauthorized act, and a man gets injured as a result of that.

But if that contributes in whole or in part to his injury, then they're responsible for it.

Mr. Sullivan: Your Honor, Mr. Frates' argument would completely nullify the Railroad Labor Act.

Mr. Frates: You tell the Judge what the Railroad Labor Board would do in a case like this. They don't award damages. They don't put the man back to work. This is something that's happened.

Mr. Sullivan: Your Honor, it's our position that the plaintiff is trying to inject into this trial an element that doesn't—if he comes within the statute at all—and we're not sure that he does, or on a common-law basis he can bring an action on a negligence theory. There's no doubt about that.

But we don't think he can inject into it things that are labor matters, and put those before the jury and, in effect, [fol. 295] allow the jury to pass on them.

Mr. Frates: What's the labor matter? You tell us. We say you took the man out there and made him do something that was negligent and careless and had no right to do it, and as a result he was injured.

That's no labor matter.

The Court: Gentlemen, I will deny the motion to strike and we will proceed with the completion of the testimony at this time.

Mr. Sullivan: Your Honor, we have one other request to make of the Court at this time, and that is if the Court —I'm not sure of the mechanics of it, but if the Court would direct the Clerk, or on it's own—I'm not quite sure how you do it, but to have a subpoena issued for Mr. C. A. Brinegar, if we can locate him, to allow us to call him as a witness in the trial.

Mr. Frates; Who is he?

Mr. Sullivan: Mr. Smith testified about him yesterday.

Mr. Frates: I have no objection if you can get the sheriff to come.

Mr. Sullivan: We're trying to locate him. But if he can find him—

The Court: We're perfectly willing to direct the Clerk

to issue the subpoena, and it will be a question of whether the sheriff can put somebody out there that can catch him [fol. 296] or find him this morning.

Is there any other information you need about him besides his name?

Mr. Sullivan: He's a conductor-trainman on the railroad. Perhaps we can locate him at the railroad station, your Honor. If we can't there, I don't know where else he can be located.

The Court: At the FEC railroad station?

Mr. Sullivan: Yes.

The Court: All right. Bring the jury in.

(Thereupon the jury returned to the courtroom, and the following proceedings were had:)

The Court: Will the record note the presence of our trial jury this Saturday morning, and we will proceed.

Thereupon—

W. A. Bader was called as a witness in behalf of the Defendant, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sullivan:

Q. Would you state your name, please?
A. W. A. Bader.
Q. And where do you live, Mr. Bader?
A. Miami.
Q. Who do you work for?
[fol. 297] A. The Florida East Coast Railway.
Q. In what capacity?
A. Special agent.
Q. Could you tell us, generally, what a special agent is, what his duties are?
A. Well, they are many and varied. We take orders from the superintendent and chief operating officer, and it's generally a protection job. But with various other as-

signments of anything that may come up that the management is interested in.

Q. Were you working for the railroad as a special agent in September of last year?

A. Yes, sir; I was.

Q. Do you remember a field test that was given Mr. Bert-Smith?

A. Yes, sir.

Q. Were you present at any time when that test was being given?

A. Yes, sir; I was.

Q. What were you doing? Why were you present at the test, Mr. Bader?

A. Well, the purpose of my participating in the test was to drive the automobile in order that the men who were actually making the test, after they had walked the mile, wouldn't have to walk the other mile back to get the auto- [fol. 298] mobile, and for the second reason, the test was laid out on a stretch of one mile where there was only one public crossing that may have been a hazard.

Q. You mean a street crossing or a grade crossing?

A. That's right, to Mr. Smith while he was walking. So following the starting of the test, I was ordered to go to the crossing in order to protect Mr. Smith when he went by the crossing.

Q. Now, where did the test start out, Mr. Bader, do you remember?

A. It started at railroad mile post 355, which is in North Miami, and directly opposite the Peoples Gas Company at the north end of their property, or practically the north end of their property.

Q. The test was to walk one mile in a southerly direction?

A. That's right, from the 355 mile post to the 356.

Q. Now, I think there's been testimony, Mr. Bader, by Mr. Clark, Mr. Delk, Johnson and Mr. Smith all started walking down the tracks. Can you tell me who was walking with whom?

A. Well, when we arrived at the 355 mile post, Mr. Clark and Mr. Johnson and I got there first, and shortly after that Mr. Baumberger drove up with Mr. Delk and Mr. Smith. And then there was a—we walked out to the mile

[fol. 299] post and we noticed a southbound freight train coming, so they waited until after the train had passed the mile post so that that would not interfere with the test.

And then they compared watches. That is, everybody but me. I wasn't required to do that. And the test was commenced, and they started out more or less bunched up, the five of them, but as the distance went on, Mr. Clark and Mr. Johnson led, and after another short while Mr. Baumberger and Mr. Delk got separated from Mr. Smith and then it followed through that way to the end, or as far as the test went.

However, the gap continued to widen.

Q. Between Mr. Clark—

A. Between Mr. Clark and Mr. Johnson and Mr. Delk and Baumberger and Mr. Smith.

Q. Did you stay at 355 mile post for any time?

A. I remained at the 355 mile post for approximately I would judge five, six, maybe seven minutes after the test had started and they had departed.

Q. Did you have an opportunity to observe the people walking down the track?

A. Yes, sir; I did.

Q. Did they walk down to the south end of the gas plant Were you able to observe them that far?

A. Who, all of them do you mean?

Q. Yes.

[fol. 300] A. Well, by the time they got to the south end of the gas plant, my recollection is that they were divided into three groups. However, they were all within my vision until they got south of the gas property, the gas company.

Q. I'd like to ask you, during that time, Mr. Bader, did you saw anyone fall down?

A. No, sir.

Q. No one of the five people walking along the track?

A. No, sir.

Q. What did you do after that, sir?

A. Well, the next thing that I was to do was to go to the Northeast 146th Street crossing. That was the public crossing that Mr. Smith was going to have to walk over.

So I went back to the automobile, Mr. Clark's automobile and drove that to the Northeast 146th Street crossing. And

when I arrived there, there was the Old Dixie Highway is on the east side of the right of way. I pulled right up against the right of way, or in fact, borders on it, and I headed the car south off of 146th Street and took up a position on the crossing.

Q. Did you observe any of the five people come up to the crossing?

A. Four of the five crossed the crossing. First was Mr. Clark, and Mr. Johnson; and following them, at a distance, [fol. 301] I presumed to be about a thousand feet, Mr. Delk and Mr. Baumberger. But Mr. Smith never did get to the crossing.

Q. At the time that Mr. Clark and Mr. Johnson got to the crossing, how far behind Delk and Baumberger was Mr. Smith? Are you able to estimate that?

A. Well, I would estimate that Mr. Baumberger and Mr. Delk would have possibly been a thousand feet in back of Mr. Clark and Mr. Johnson, and possibly Mr. Smith was another thousand feet in back of Mr. Baumberger and Mr. Delk.

Q. Where was the crossing in relation to the 356 mile post?

A. I should judge—I didn't measure it, but I should judge possibly two-tenths of a mile north of the 356 mile post.

Q. Were you able to observe Mr. Clark and Mr. Johnson when they got to the 356 mile post?

A. Oh, yes.

Q. Were you able to observe Mr. Delk and Mr. Baumberger at the 356 mile post?

A. Yes. That was straight right in there—no obstructions of your view at all.

Q. You were still down at the crossing at this time?

A. Standing right on it, approximately the center of the crossing.

Q. What happened after that, Mr. Bader?

[fol. 302] A. Well, after the four men got to the 356 mile post, I don't know which ones, but some of them sat down on the rail of the track and some stood up. Well, I was, of course, sent there to look out for Mr. Smith, so I kept watching him as he was coming south.

And I observed him fall forward, and I hesitated for an instant and he didn't recover. I thought at first maybe he might have tripped, but when he didn't get back on his feet I ran to the automobile and got in the car and drove opposite the 356 mile post, which is on the west side of the right of way, but the road I was on was on the east side.

And approximately 150, 200 feet separated from the men, and I jumped out and I yelled at Mr. Baumberger that Mr. Smith had fallen and hadn't recovered. And about that time Mr. Baumberger started towards me across the right of way, and Mr. Clark yelled to me to carry Mr. Baumberger to the gas plant, the north end of the gas plant where the test originated, to retrieve his automobile.

Q. Go on, Mr. Bader.

A. So Mr. Baumberger continued over and got in the vehicle with me, and I reversed and headed back north to 146th Street, and while I was turning around Mr. Smith got back on his feet and was standing up, or attempting to walk.

However, while I was driving from the point that I turned around to Northeast 146th Street, I was looking straight [fol. 303] ahead and Mr. Smith was in my view, and he fell for the second time. And I went east then on 146th Street to Biscayne Boulevard, and then Mr. Baumberger and I decided that maybe before we went on for his automobile at the north end, or at the gas plant, we better see what the situation was with Mr. Smith.

So north of 146th Street at that time, at least, there was no road and I went north on the Boulevard to Mitten's Cabins & Motel, and went through their driveway which borders on the east side of the right of way. And then there's a road, a private road in there that runs south paralleling the right of way.

So we drove to where Mr. Smith was laying, and at that time he was in between the—what we call the passing track and the southbound main line track, and laying face forward or headed south. And Mr. Baumberger told Mr. Smith that the test was definitely over as of now.

And as I recall, he told him not to move. And one thing that we were concerned about was whether or not his legs might have been hanging over the rails of the track.

that he might have been run over if there had been a train coming along. However, we developed that he was in the clear, and Mr. Baumberger told him to stay in that position, that he was going to get his automobile and would come back and pick him up.

[fol. 304] So we went to the north end of the gas company where Mr. Baumberger's car was parked, and left him out there and I immediately returned. And by the time I returned, or while I was gone I'll say that Mr. Smith—you could see that he had crawled, apparently crawled—at least, the marks that I assume were crawl marks, approximately a hundred feet south of the position where I had last seen him.

And when I got there, Mr. Johnson and Mr. Delk were already where Mr. Smith was at. And shortly thereafter, Mr. Baumberger followed me right there, in his own car. And then Mr. Johnson and Mr. Baumberger assisted Mr. Smith from the point where he was between the southbound main line track and the passing track to the vehicle. They put him in the automobile and drove away.

Q. Mr. Bader, during that time you were with Mr. Baumberger when you were going down to Mr. Smith, and during the time you were obtaining cars and going up to him, and before he left to go to the doctors, can you tell us whether or not anyone mentioned anything about wire to you?

A. No, definitely not. I didn't know that wire was mentioned or hadn't heard anybody mention wire until later in the same day of September 13, after we had returned to our office in the passenger station in Miami, I'd say several hours after the test had been completed.

Mr. Sullivan: Thank you.

[fol. 305] Cross examination.

By Mr. Frates:

Q. Mr. Bader, who mentioned the wire at that time?

A. Well, it's my recollection that either Mr. Johnson or Mr. Clark mentioned it to me, that it had come to them from some source. I don't know where that came from.

Q. Your primary concern was, "Get the man to the hospital or to a doctor," wasn't it?

A. Well, he looked to me as if he needed medical attention.

Q. Yes, sir. Your primary concern was to get him to the doctor, wasn't it?

A. Well, I didn't take him, Mr. Frates.

Q. No, but you wanted to see that he got to a doctor.

A. Surely.

Q. The man was in pretty bad shape from your observation of him, was he not?

A. Well, I couldn't—I couldn't determine what shape he was in.

Q. Well, from a layman's viewpoint. I realize you're not a doctor, but you were concerned as everyone else was, and they wanted to get him to a doctor as quickly as possible, didn't they?

A. I presume it was the general thing.

[fol. 306] Q. That's what you thought, wasn't it?

A. Surely. Here's a man laying down in between the tracks.

Q. Tell the jury how he looked, as far as his facial expression—

A. Well, his face was red. I would judge, very flushed, but as for his locomotion, he didn't look to have any broken bones or any injuries of that nature.

Q. Did the thought occur to you that he might have had some heart attack?

A. That certainly did.

Mr. Sullivan: Your Honor, I don't think we ought to go into Mr. Bader's process—it's not—

Mr. Frates: I think it is.

By Mr. Frates:

Q. You weren't concerned about wire—

The Court: Don't ask another question before I rule on the objection. I'll overrule the objection. Let's go ahead.

By Mr. Frates:

Q. Mr. Bader, you're what a layman calls a railroad policeman, aren't you?

A. That's right.

Q. A railroad "bull" in other words.

A. That's right.

Q. You don't belong to any union, do you, sir?

A. No, sir.

[fol. 307] Q. You've been working for the railroad approximately 13 years, haven't you?

A. That's right; yes, sir.

Q. Have you ever participated in a test similar to this where a man was made to walk down the track, in those 13 years?

A. No, sir. I have participated in many tests, efficiency tests and otherwise, but never a walking test.

Q. Never a walking test of this type.

A. No, sir.

Q. Will you tell the jury how far you could see? You have given some distances. Will you tell the jury how far you could see down that track when you were out there?

A. From which point, Mr. Frates?

Q. Well, at any point, the maximum distance that you could see down that track.

A. Oh, I'd say a half mile or better.

Q. How far is it from 356 to the gas plant?

A. Well, now, I didn't measure it.

Q. Approximately.

A. But I'll give you an approximation of it. From the point where the 355 mile post is to the siding going into their plant, I think their siding holds eight cars, which would probably be in railroad lingo, 50 feet per car, or 400 feet from their point—from their switch into, or to the mile post.

[fol. 308] Q. Well, now, the mile post—

A. Is north of their tracks.

Q. North of their tracks.

A. That's right.

Q. How far north of it?

A. Well, I—

Q. Mr. Bader, can't you see at least a mile down there? Couldn't you see a man at least a mile down that track that day if he were walking along?

A. Well—

Q. Within the realm of a mile?

A. Yes, but, however, there's one thing that you've got to take in consideration in looking on a flat surface of that kind, is that you're on the level with him.

Q. That's right. So if you're up here you could see him further.

A. That's right.

Q. But somewhere around a mile you could see—

A. I'd say, to be positive, in excess of a half mile.

Q. And if you were up in the cab of an engine you could see considerable more.

A. That would be my judgment.

Q. You've been in cabs plenty of times, haven't you?

A. Many times.

Q. You can see a long way down the track, can't you?

[fol. 309] A. That's right.

Q. Did I understand you to say that you were concerned about him being on the rails, and the possibility of a train coming along and injuring him?

A. That's right. In other words, there was no way for me to determine if there was any overdue trains or—and first, when we went to him I wasn't sure just where he was laying, whether he was laying in between the rails of a track or in between what we call the six-foot, which would be in the clear.

Q. You, as the railroad policeman, were concerned about that as a possible danger?

A. For his safety, yes, sir. I sure was.

Mr. Frates: Thank you, Mr. Bader.

Mr. Sullivan: Thank you, Mr. Bader.

(Witness excused.)

Thereupon—

J. H. JOHNSON was called as a witness in behalf of the Defendant, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sullivan:

Q. Would you state your name, please?

A. J. H. Johnson.

Q. Do you work for the Florida East Coast Railway [fol. 310] Company, Mr. Johnson?

A. Yes, sir.

Q. In what capacity, sir?

A. Road foreman of engines.

Q. What is a road foreman of engines? What are your duties, generally, in that job?

A. I instruct the engineers and firemen.

Q. Would it be accurate to say, Mr. Johnson, that you are generally in charge of the engineers and firemen, the engine crews, whereas Mr. Clark is in charge of the trainmen and conductors?

A. That's right.

Q. Were you present when a field test was given to Mr. Bert Smith last year, Mr. Johnson, in September?

A. I was.

Q. There's been testimony, Mr. Johnson—I'm not going to ask you to go through it again, about all the details of the test. I would like to ask you this, sir: You were walking along with Mr. Clark, were you not, sir?

A. Yes, sir.

Q. And it took you how long to walk the mile, Mr. Johnson?

A. Nineteen minutes and six seconds by a stop watch.

Q. Now, at that time, Mr. Johnson, can you tell us how old you were?

[fol. 311] A. How is that?

Q. At that time, at the time this test was given, can you tell us how old you were?

A. Sixty-six years old.

Q. How tall are you, sir?

A. Five foot seven.

Q. And what's your weight, Mr. Johnson?

A. One hundred eighty.

Q. Mr. Johnson, as you and Mr. Clark walked from mile post 355 to 356 can you tell us whether or not either of you fell or stumbled at all?

A. Neither one of us fell or stumbled.

Q. Did you see any wire along that right of way as you walked along there, Mr. Johnson?

A. No, no wire along there.

Q. As you got down to mile post 356, Mr. Johnson, Mr. Baumberger and Mr. Delk came up behind you, did they not?

A. I would say two or three minutes behind us.

Q. Now, at the time they came up would you state whether or not either of them mentioned anything to you about wire or Mr. Smith falling on any wire?

A. Neither one of them.

Q. Now, did you observe Mr. Smith when he fell, Mr. Johnson, at any time?

A. No. Mr. Delk called it to my attention, that he had fell.

[fol. 312] Where were you at the time he called it to your attention?

A. Sitting on the east rail of the southbound main line opposite mile post 366.

Q. What was Mr. Delk doing at that time?

A. Standing at that time, I believe.

Q. After he called it to your attention what did he do, if anything?

A. He immediately started walking towards Mr. Smith.

Q. Now, what did you do, Mr. Johnson?

A. I followed him.

Q. How about Mr. Clark? Where was he?

A. Mr. Clark left about the time I did, in the same direction.

Q. How about Mr. Baumberger? What did he do?

A. Mr. Baumberger, if I remember correctly, walked towards Mr. Bader where the car was located, and got in the car with Mr. Bader.

Q. And do you know where they went after that? Did they go down to where Mr. Smith was?

A. They went to get Mr. Baumberger's car.

Q. And then went back to Mr. Smith?

A. Yes.

Q. How many times, to your knowledge, did Mr. Smith [fol. 313] fall, Mr. Johnson?

A. I saw him fall the second time, and if he got up after that, I think he crawled a short distance after that.

Q. Well, where were you when you saw him fall the second time?

A. On my way up to where he was—had fell the first time.

Q. Did you get there before Mr. Bader and Mr. Baumberger?

A. No, I understand they stopped on the way up to get Mr. Baumberger's car, and then proceeded from there on up to get his car.

Q. I mean, did you get to Mr. Smith before they did?

A. Yes.

Q. Did he say anything to you at the time you got there?

A. Yes, he made some remarks.

Q. What did he say, if you can remember?

A. He said that the doctor told him to walk slow and take his time, but he says, "I guess I was a fool. I wanted to show you fellows that I could do as good a job as you could."

Q. Now, when you got down to where Mr. Smith was, did you have occasion to inspect the area where he had fallen or where you had seen him fall?

[fol. 314] Mr. Frates: What fall are you referring to, Mr. Sullivan? I object to the general question in view of the fact that there is more than one fall related by Mr. Johnson.

By Mr. Sullivan:

Q. Either the one that was called to your attention by Mr. Delk, or the occasion where you saw Mr. Smith fall.

A. I inspected both places where he fell the first time, and also where I saw him fall.

Q. What did you find when you inspected those places, Mr. Johnson?

A. I didn't find anything that would cause a man to fall.

Mr. Frates: I object to that, your Honor, and move it be stricken as a conclusion of the witness.

The Court: Sustain the objection. Strike the last statement.

By Mr. Johnson:

Q. Mr. Johnson, can you tell us whether or not there were any obstructions or obstacles in either place?

Mr. Frates: I object to the word "obstructions." I think he ought to describe it physically, your Honor.

The Court: I will permit you to cross examine him and I'll overrule that objection.

By Mr. Sullivan:

Q. Can you tell us whether or not there were any obstructions or obstacles either place where Mr. Smith fell? [fol. 315] A. No, nothing more than just an ordinary piece of railroad track with ballast.

Q. Where was Mr. Smith walking? Was he walking in between the rails of one of the tracks, or between the tracks or where?

A. He was walking between the southbound main and the passing track.

Q. Now, Mr. Johnson, as road foreman of engines have you had occasion to give field tests to your engineers or firemen?

A. Yes, sir.

Q. What have those tests consisted of?

A. Consisted of sight; color; being able to determine color switch targets, and what-not. Also hearing tests.

Q. Have you had occasion to give any other kind of tests that involve moving around, or any other physical exertion?

A. No.

Q. What was the purpose of the sight and hearing test you gave, Mr. Johnson?

A. To determine that they could see signals properly.

Q. As road foreman of engines do you also give efficiency tests to the engineers and firemen?

A. I didn't understand that.

[fol. 316] Q. Excuse me; I'll speak a little louder. As road foreman of engines do you also give efficiency tests to the engineers and firemen?

A. Yes, sir.

Q. And you give those almost daily, do you not, Mr. Johnson?

A. I make 30 a month, one for every day.

Q. Can you give us some examples of the kind of tests you give as efficiency tests?

A. Yes. Sometimes I put a jumper cable on a track which will cause the signals to change colors. In other words, put it on there and the approaching signal will be yellow and the next signal will be red, which requires the engineer to slow down for the caution signal and stop before passing the red signal.

Q. When you do this, the engineer doesn't know whether there's actually some emergency up ahead or whether it's an efficiency test, does he?

A. The engineer doesn't know, anyways, close to that vicinity. I do those as surprise tests.

Q. And you don't give anybody any notice or let them have any representatives with them when those tests are given, do you, Mr. Johnson?

A. No, sir.

Q. Over how many years have you been giving tests [fol. 317] like that?

A. Better than 15 years as road foreman of engines.

Q. Do you know whether or not such tests were given before you became road foreman of engines?

A. They had been given for, I would say, possibly 50 years.

Q. Mr. Johnson, before you became road foreman of engines what sort of work did you do on the railroad?

A. Locomotive engineer.

Q. And as an engineer were you a member of one of the railroad brotherhoods?

A. Yes, sir.

Q. How about at the present time, sir?

A. I'm still a member of the Brotherhood of Locomotive Engineers.

Q. Are you still on the engineer's seniority list?

A. Yes, sir.

Mr. Sullivan: Thank you, Mr. Johnson.

Cross examination.

By Mr. Frates:

Q. Mr. Johnson, you're not an active member of the union, are you?

A. I pay my dues, Mr. Frates.

Q. But you don't go to any of the meetings.

A. No.

[fol. 318] Q. It's sort of a closed door to you?

A. Well, it isn't—no.

Q. They'd probably like to see you on a social gathering, but you don't participate in the gatherings of the union at all, do you?

A. No.

Q. You're a supervisor or one of the executives of the railroad.

A. That's right.

Q. Now, these tests that you have made—that's a test to see whether or not the engineer and the fireman are paying attention to the block system; isn't that right?

A. It's a test, Mr. Frates, to determine whether or not they're alert in complying with the rules of the railway.

Q. That's right, as far as the signals are concerned.

A. Yes, sir.

Q. You don't require them to get down and walk around the train and examine it, or anything like that, do you?

A. No, sir.

Q. Mr. Johnson, how long have you been working for the Florida East Coast Railroad?

A. Better than 25 years.

Q. I'd like you to tell the jury whether or not in those 25 years you ever participated or ever heard of a test

[fol. 319] like the one that you went out there that day that was given to Bert Smith?

A. No, that's the first walking test we've ever had to take.

Q. Now, when you perform these efficiency tests, as you call them, in putting the block system on—incidentally, what is the purpose of the block system?

A. It's more or less to advance the movements of trains.

Q. Well, that is a safety factor involved in it?

A. Yes, sir.

Q. What's the safety factor?

A. We can operate trains at a faster rate of speed than we could if we did not have the block signal system.

Q. Actually, you've reduced the speed, though, haven't you? A few years ago wasn't your maximum speed greater than it is at the present time?

A. Yes, sir.

Q. How fast was it?

A. Eighty-five miles an hour.

Q. And it's seventy-nine miles an hour now?

A. Seventy-nine.

Q. The block system, if a train is stopped, will warn the train back of it, won't it, if there's one back of it, and that's one of the purposes of it?

[fol. 320] A. That's right.

Q. It flashes a red and then a caution on it?

A. Well, the first indication the approaching engineer would get would be a caution signal, and the next would be—

Q. The caution would be the third one back. In other words, if he were in one block.

A. It should be the second one back.

Q. I would call that one, one; then the one next to the train would be red, would it not?

A. Yes, sir.

Q. And one on caution. When he gets to caution what does he do?

A. Reduces speed.

Q. To what?

A. Half the maximum permissible speed.

Q. In other words, get ready to stop, is what you are telling him, in effect, to do, isn't it?

A. Be prepared to stop.

Q. Be prepared to stop. Now, on these tests that you made, of course, the flagman is required to get down, is he not?

A. The flagman is required to get down on the ground and go back and protect the train, if necessary.

Q. That's right. Now, if the flagman doesn't do that, [fol. 321] —you make these tests quite frequently, don't you?

A. Yes, sir.

Q. And other men on the railroad make these tests to see whether or not—if the flagman doesn't do that, what happens to him?

A. If the flagman doesn't comply with his rule to get on the ground and prepare to flag, if necessary, we usually call him in and handle it with him.

Q. He can get some demerits, and if he gets enough demerits he gets fired, doesn't he?

A. That's right.

Q. Are you aware of the fact that Mr. Smith has never gotten a demerit since the period of time—

Mr. Sullivan: Just a minute.

Mr. Frates: I withdraw it. I think it's probably argumentative. I withdraw it.

By Mr. Frates:

Q. You, as a supervisor of the railroad, can point out or call to the attention of the management or the proper authorities any improper activity or conduct on the part of anyone on the train, can you not?

A. Yes, sir.

Q. And you ride the trains all the time up and down here?

A. Yes, sir.

Q. That's part of your job.

[fol. 322] A. That's part of my work.

Q. Do you recall an incident, Mr. Johnson, where you pulled one of these tests around Delray Beach on Train 76, and Mr. Smith was flagman and you got on him for going back too far? Do you recall that incident?

A. I did not pull a test on Mr. Smith at Delray Beach.

Q. Well, was the train stopped?

A. It was.

Q. And did you tell him that he had gone back too far?

A. No; I can relate the story of that, if you like.

Q. Do you deny that you told him he had gone back too far?

A. I deny it.

Q. You deny it. Well, what was the trouble?

A. I was riding the first 76, and we had quite a bit of express work at Delray Beach. And when we arrived at Delray Beach I instructed the engineer to whistle out a flag, as we had a second 76 that night. We loaded the flowers—

Q. Let me ask you, sometimes you don't blow them out, do you?

A. Not for a regular station stop on passenger trains. We had about 15 minutes or more express work loading flowers. When they finished loading the flowers I told the [fol. 323] engineer to whistle—call the flag in. He called him in by a whistle signal. We waited five or six minutes and I did not see a signal from the flagman. I walked back by the side of the train, and east as far as I could on the right of way, and I still could not see a signal. I told the conductor to wait and I would go back and see where the flagman was.

I walked through the train out on the rear car of the train. Mr. Smith was standing there on the back platform with his back to the wall cursing the engineer for whistling him out. The conversation I heard was, "I'll teach that so-and-so how to whistle me out. I'm the best flagman on the railroad."

Q. Did you make a report of this?

A. I did.

Q. Do you have a copy of it with you?

A. No, I don't.

Q. Was there a hearing on this thing?

A. Yes, sir.

Q. And, actually, he was down the track; that was determined, wasn't it? Mr. Johnson, do you have that report with you?

A. No, I don't. That's been about 12—14 years ago, Mr. Frates.

Q. And you deny that you got on him for going too far back on the train.

[fol. 324] Mr. Sullivan: Your Honor, if Mr. Frates wants to go on with this, I think we ought to make Mr. Frates make Mr. Johnson his witness.

The Court: Sustain the last objection.

By Mr. Frates:

Q. Can you tell the jury how high the floor of the engineer's cab is?

A. Approximately 12 foot.

Q. What is the duty of the fireman on the engine?

A. To watch out for signals and also look after the mechanical department of the diesel back in the engine room.

Q. And the engineer, of course, is required to be a lookout, too, is he not?

A. Yes, sir.

Q. On your high-speed trains your engineers' main function is just to be a lookout, isn't it—look down the tracks?

A. He has to keep an eye down the track and he also has to talk with the firemen, caution them, tell them what to do.

Q. I'm sorry, I meant the fireman, Mr. Johnson. If I said the engineer, I meant the fireman. His main duty is to be a lookout and look down that track for signals, isn't it?

A. No, sir; I wouldn't say that, Mr. Frates. We require him to go back in the engine room and look after the mechanical department and the electric equipment of the diesels, and come up in the engine room at all cities, going through Miami; Ft. Lauderdale; Hollywood; West Palm [fol. 325] Beach—he has to be up in the engine room with the engineer. Other than that, he can be back in the control room looking after mechanical and electrical equipment.

Q. Now, Mr. Johnson, as a matter of fact, where does he spend most of his time?

Mr. Sullivan: Your Honor, I have no objection, but I thing Mr. Frates ought to make Mr. Johnson his witness if he's going on with his interrogation.

The Court: I will sustain the objection to the last question as being outside—

By Mr. Frates:

Q. How far could you see down the track up there the day they made that test?

A. Which test are you speaking about?

Q. The day of the test that we're discussing now, the field test, this "Bert Smith test" I call it.

A. I would estimate three-quarters of a mile.

Q. You could see a man about three-quarters of a mile?

A. Yes, sir.

Q. How wide is the right of way, the tracks there where the accident occurred, or where Mr. Smith fell the first time?

A. I couldn't tell you that. I don't know the distance of the right of way.

Q. Well, how wide—you've got three tracks in there, [fol. 326] haven't you? How wide would the area be from, say, 10 feet on either side of the easternmost and the westernmost track?

A. Well, we have 13-foot centers from center to center. That would be about, approximately—the right of way should be in the neighborhood of 36 to 40 foot there.

Q. You didn't go back and make a minute inspection of this area, did you?

A. I've been back there since the accident.

Q. But I mean at the time of the accident, looking for wire.

A. No.

Q. What was there, Mr. Johnson, in that general area? I'd like to ask you if there was any, where he fell the first time, if there was any grass there around that area.

A. Yes, sir.

Q. And that was beside the tracks and between the tracks; right?

A. Yes, sir; there's grass.

Q. Were there weeds there?

A. Some. I don't recall just how big they were.

Q. Well, it was a dry day, so I assume there wasn't any mud there, was there?

A. No, sir.

Q. But there was grass and weeds. Were there rocks, bal-
[fol. 327] last, in the walkway. Were there any rocks around there?

A. Some, yes, regular ballast.

Q. Now, the ballast is not supposed to be in the walkway, the ballast for the rails, isn't it?

A. Well, outside of the ties—some of it does filter down between the tracks. There's no walkway there, Mr. Frates.

Q. Between the tracks, were there rocks there?

A. A few.

Q. They weren't serving any purpose there as far as ballast was concerned, were they?

A. No.

Q. And were they there where Mr. Smith fell?

A. I would say—

Q. In that general area?

A. I would say as an average.

Q. We're not asking you about average. We're asking you what was there in the area where he was walking? You've said grass and weeds and rocks from the ballast, but it rolled down in.

A. Regular ballast, yes.

Q. But they weren't serving any purpose as ballast in between the tracks, were they?

A. No, sir.

Q. Is this also true of the other two places where he
[fol. 328] fell?

A. Yes, sir.

Q. You didn't go over to see if there was any wire that had been pulled off or anything of that nature, did you?

A. Not at that time, but I have been up there since.

Q. When did you go back after?

A. Possibly a week after.

Q. A week after that?

A. Yes, sir.

Q. Why did you go back?

A. I understood that Mr. Smith made a report that there was wire.

Q. Did you mention it the day of the accident? Did anybody mention it to you?

A. Nobody mentioned it to me that day.
Q. Did you hear it discussed?
A. No.
Q. Have you discussed this case with Bader?
A. We have talked, yes.
Q. Did you talk about it that day?
A. Not that day.
Q. Did he go back with you?
A. No, sir.
Q. You're not saying there wasn't any wire there; you just didn't see any from what inspection you made of it. [fol. 329] Is that right?
A. I didn't see any.
Q. When did you look? After they had taken Smith to the hospital?
A. Yes, I said I think it was about three or four days later.
Q. Oh, three or four days later?
A. I had heard that there was wire up there.
Q. Did you make any inspection when he fell?
A. No, I did not.
Q. Oh, I misunderstood you. I thought you said that you had made an inspection at the time, the day he fell.
A. No, I didn't see any wire the day he fell. Nothing was mentioned about wire. I assisted Mr. Smith to the car. Mr. Baumberger and I picked him up and assisted him from where he fell to Mr. Baumberger's car.
Q. That was the last time he fell, wasn't it?
A. Yes.
Q. In other words, that was the third time he fell. You didn't help him up on the other two occasions, did you?
A. No.
Q. And you weren't back there when he fell, were you?
A. No.
Q. What was his condition when you went to him when [fol. 330] he fell the third time?
A. Well, he was lying on his side and he was breathing rather hard like he was completely exhausted.
Q. And did you feel that he needed medical attention?
A. No, I didn't.
Q. You didn't?

A. No.

Q. Did you get back to him when he was prostrate on the ground?

A. Yes, I helped him up.

Q. You helped him up and you thought he was all right?

A. Just exhausted, that's all.

Q. Did you hear Mr. Clark call for an ambulance?

A. No, sir; I did not.

Q. Did anybody call for an ambulance?

A. Not that I know of.

Q. Or say anything about calling for an ambulance?

A. Not that I know of.

Q. Where was he taken, do you know?

A. Well, I heard he was taken to Dr. Nash's office. I don't know.

Q. Dr. Nash, the railroad staff doctor?

A. Yes, sir.

Q. Why was he taken there?

[fol. 331] A. You'll have to ask Mr. Baumberger or Mr. Smith. I had nothing to do with that.

Q. You weren't concerned about it?

A. No.

Q. Now, how long have you been riding the trains up and down here as a road foreman of engineers between here and Ft. Pierce?

A. Fifteen—better than fifteen years.

Q. Isn't it true, sir, that you have the right to take any man off the job when he's not doing the job properly?

A. No, I do not.

Q. You don't. Do you mean you can't take a man off the job or keep him from working?

A. Not while he's on the trip, no.

Q. Not on the trip, but I mean you can after the trip is over, you can take him out of duty, can you not?

A. No, I can not.

Q. Well, who can?

A. Well, I make a report of it to my superiors and then we decide whether he should be taken out or not.

Q. "We" decide. Who is "we"?

A. The superintendent.

Q. That's right. But the superintendent—he can tell you, "Let's take this man off."

A. Yes, sir.

[fol. 332] Q. And you can take him off the train, can't you?

A. Yes, sir.

Q. And you actually, Mr. Johnson, can take somebody off the train or not let the train move if you think there's an engineer or fireman there that's not competent to go out, can't you?

A. I can.

Q. So you can take them off the train if you think they're not in good physical condition to do the job the way they're supposed to do it in accordance with the rules.

A. If I go out and find an engineer or fireman that's under the influence of alcohol I do not let him go out.

Q. Or any other physical disability you think that would impair his efficiency in the safety and operation of that train.

A. I've never had that occasion.

Q. But I mean, you have that authority.

A. Yes.

Q. And other men who are over other operating personnel have that same authority, do they not?

A. I would think so.

Q. Now, Bert Smith has been of the same general size and build and type, and walked about the same way for a number of years, hasn't he?

A. I'd say the past five years, anyway.

[fol. 333] Q. Five years, and during that period of five years he's been flagging for the Florida East Coast; is that correct, sir?

A. Most of the time, yes. He works as baggagemaster and flagman.

Mr. Frates: Thank you.

Redirect examination.

By Mr. Sullivan:

Q. Mr. Johnson, about how far apart is each block signal from the other, say, on the northbound and the southbound tracks?

A. Approximately one mile.

Q. And they're set up so that when a train is two miles away, if the blocks are operating the way they ought to, the engineer will get a yellow or caution signal when he's within one mile; he will get a red signal.

A. Yes, he will, if the train is standing, beyond the next block, he will get a red signal.

Q. The block immediately behind any stopped train will be red. The block behind that will be yellow.

A. That's correct.

Q. Now, Mr. Johnson, do you, in terms of conductors and trainmen—can you pull them off the job, or is that for some other official of the railroad?

A. That would not be my responsibility.

[fol. 334] Q. Would that be Mr. Clark's?

A. Yes, sir.

Q. He has an equivalent job; his job as trainmaster is really on a par with yours as road foreman of engines?

A. That's right.

Q. Except it applies to different personnel.

A. That's right.

Q. Mr. Johnson, as road foreman of engines do you ride with engineers and firemen to determine whether or not they're fit to run engines, or do the duties required of engineers and firemen?

A. Well, I wouldn't say it was for that reason. I ride the engines with the engineers and firemen in order to check up on the equipment, and also the engineer and fireman. But my responsibility also requires that I see that the locomotives are kept in good working condition.

Q. Well, if someone has been on a leave or on some extended leave, would you ride with him before you let him go out?

A. If he's been off the railroad more than six months.

Q. You check him to see whether or not he's qualified to perform his duties?

A. That's right. He reports to me before he goes to [fol. 335] work.

Q. When was it that you first heard of wire in connection with this field test, Mr. Johnson?

A. Several days after the test was made.

Q. That's the first time you looked for wire out on the right of way?

A. That's right.

Q. At the time that you went back to Bert Smith can you tell us whether or not you examined the area to see if you could determine what had caused him to fall?

A. Yes; I went back up there and we examined the area to see if we could see any wire or anything that would cause him to fall.

Mr. Frates: Just a minute. I think there's a little misunderstanding. Is this the time he fell or after he fell?

The Witness: After he fell.

Mr. Frates: Is this the day? I think that he said he didn't go back till three or four days. If he didn't know about any wire I don't think he could go back to the day—

By Mr. Sullivan:

Q. My question to you was, Mr. Johnson, at the time Mr. Baumberger and Mr. Bader were back there with Bert Smith, at the very time he'd fallen, whether or not at that time you made any inspection of the immediate area where he was.

A. Yes.

[fol. 336] Q. But you weren't looking for wire at that time because you hadn't heard of anything.

A. I hadn't heard of any wire at that time.

Q. Do you know how many times Mr. Smith fell?

A. No; I understood he fell one time and I saw him fall the second time.

Q. So you know of two times?

A. I know of the third time—Mr. Smith never did get up in a walking position.

Q. Now, what was the distance—can you give us any estimation of the distance between the place where he fell, as Mr. Delk mentioned, what you called the first time, and where you saw him the second time?

A. It would only be an estimate. My estimation would possibly be a hundred to a hundred and 40 to 50 feet.

Q. And about how far from there where you found him when you went up to him?

A. Well, it's about a hundred and—better than a hundred feet from where he fell the second time, where I saw him fall.

Mr. Sullivan: Thank you.

Recross examination.

By Mr. Frates:

Q. Mr. Johnson, how far had he walked from where he had started? Did you and Mr. Bader measure it?

[fol. 337] A. I believe it was something like 3000 feet. I'm not sure, Mr. Frates.

Q. You, as road foreman of engineers, make actual road checks on your personnel that you're in charge of to see whether they're doing their job properly, don't you?

A. I do.

Q. And if they don't do their job properly you see that they're called up, and if they haven't complied with the rule books they get a hearing and get some demerits, don't they?

A. Not always.

Q. Assuming that they have violated the rules and you so determine.

A. Yes, sir.

Q. And if they get enough demerits then they're fired; right?

A. Well, if they get 90 demerits we hold another conversation with them, call them in and talk to them about it.

Q. But generally, if they get enough demerits you can terminate their employment.

A. You can. Ordinarily, we don't do that.

Q. Now, there are executives and men in supervisory capacities that ride this railroad all the time, in a supervisory capacity for the railroad, don't they?

A. Well, yes.

[fol. 338] Q. Practically every day.

A. I wouldn't say every day, but frequently.

Q. Now, you or any other supervisor has the right to point out or report any deficiency in any person who operates on the train, don't you?

A. That's right.

Q. And that's part of your duty, too?

A. It certainly is.

Q. And that's part of the duty in seeing and providing for the general safety of the operation of the train.

A. Yes, sir.

Q. And that includes flagmen, baggagemen, engineers, conductors—everything, doesn't it?

A. Yes, sir.

Q. And if the men were violating, if you saw them violating the rules you would report them, wouldn't you?

A. Well, I'd call them in and talk to them.

Q. Let's assume it's somebody—a flagman or a baggageman, you would report them, wouldn't you?

A. Yes.

Q. To the proper person if they weren't complying with the rules.

A. That's right.

Q. And I assume they'd go through the same procedure and if there was a violation they'd get demerits.

[fol. 339] A. We can give demerits when it warrants them.

Q. And the other supervisors are trying to see that the men comply with the rules.

A. That's right.

Q. In the actual operation of the trains.

A. Yes, sir. That's our responsibility.

Q. And you ride a great deal and have in the last 10 or 15 years, from Miami to Ft. Pierce, and Ft. Pierce to Miami, don't you, sir?

A. Yes.

Mr. Frates: Thank you.

Mr. Sullivan: Thank you, Mr. Johnson.

(Witness excused.)

Mr. Frates: Your Honor, I wonder if we could get some idea of how many more witnesses Mr. Sullivan has. If I get some idea on that, I could make a call.

Mr. Sullivan: Your Honor, if I can ever locate this man, I may have two. Otherwise, I'll just have one as far as I know.

Mr. Frates: Could you tell me, other than Clark, who your witness is?

Mr. Sullivan: Brinegar, and I may read part of this deposition.

Mr. Frates: Then I'm not going to call anyone.

[fol. 340] Thereupon—

C. T. Clark was recalled as a witness in behalf of the Defendant, and being previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Sullivan:

Q. Mr. Clark, you were previously sworn, sir.

A. Yes.

Q. I wanted to ask you, in connection with this test that was given to Mr. Smith, why you picked the particular mile post that you did to give the test.

A. Well, it was just an average mile of track and there wasn't but one public grade crossing during the mile.

Q. I think we have previously been through testimony of your getting up to mile post, or down to mile post 356 and Mr. Delk and Mr. Baumberger coming up to you.

I'd like to ask you, at the time they came up, Mr. Clark, whether either of them said anything about Mr. Smith falling or stumbling in wire.

A. No, sir.

Q. When is the first time you heard anything about wire in connection with this test?

A. Well, Mr. Johnson and I, myself—and I don't remember—were sitting on the rail, and I don't remember whether Mr. Baumberger or Mr. Delk was sitting on the [fol. 341] opposite rail. But the other one was standing up. And after Mr. Bader came up and got Mr. Baumberger to go back and get Mr. Baumberger's car at 355 mile post, I'm sure that Delk was standing right opposite where Mr. Johnson and myself were seated on the rail.

He says, "Oops; there he fell," or words to that effect. And that was my first knowledge of him having fallen.

Q. When was the first time anything about wire was called to your attention, Mr. Clark?

A. I think it was later the same afternoon.

Q. Do you know who it was that called it to your attention?

A. I do not.

Q. When you walked the mile from mile post 355 to 356 where were you walking?

A. Well, I was picking the best footing. I think I started off on the southbound main and later switched to walking between the southbound main track and the passing track.

Q. During the mile that you walked did you see any wire, Mr. Clark?

A. I did not.

Q. I'd like to ask you, Mr. Clark, you're familiar, of course, with the rules of the transportation department, and interlocking and all the signal rules?

[fol. 342] A. That's right.

Q. Are these the rules in effect at that time?

A. They are.

Q. Are they still in effect?

A. They are.

OFFERS IN EVIDENCE

Mr. Sullivan: We'd like to introduce these.

Mr. Frates: I think you ought to designate whatever rule you're going to refer to.

Mr. Sullivan: Your Honor, they're rules pertaining to trainmasters; rules pertaining to flagmen—

Mr. Frates: They ought to be designated, your Honor, instead of just throwing the book in.

The Court: I will admit the books which have been referred to into evidence as defendant's exhibits and have them properly lettered.

(The books referred to were thereupon marked, "Defendant's Exhibits C and D," respectively.)

By Mr. Sullivan:

Q. Now, Mr. Clark, we've been talking about block signals before. Can you tell us whether or not there are any occasions when block signals are reported to you as trainmaster, or to anyone here in Miami as being inoperative?

Mr. Frates: Your Honor, the whole thing is repetitious. Every question Mr. Sullivan is asking him has been covered in either his cross examination or my examination, and [fol. 343] I object to it on the grounds that it's repetitious.

If he has anything that hasn't been covered by Mr. Clark, I have no objections to it.

The Court: I will sustain the objection to the last question.

Mr. Sullivan: Your Honor, if I could ask this question I can get to some other questions I want to ask.

The Court: I think he's already answered that question. The reason I'm sustaining it, I have no reason to think the jury has forgotten it.

Mr. Sullivan: If the question is deemed answered—if your Honor understands that Mr. Clark has already answered the question with a yes answer, I won't press the point. I'll go on.

The Court: I think you asked him about it, and that was his statement. Go ahead.

By Mr. Sullivan:

Q. Do you have copies of train orders indicating inoperative signals, Mr. Clark?

A. I do have.

Q. Did you obtain those at my request, sir?

A. I did.

Q. Do you have them with you?

A. Yes.

Q. What are the general instructions that you put out, Mr. Clark, where signals are reported to you as being [fol. 344] inoperative, block signals?

A. Well, those instructions that are put out are put out by the train dispatcher. I don't issue any instructions on a train order form. The dispatchers handle that.

Q. If a train goes out and there's been a previous report of a block signal being inoperative, what would a flagman's duty be if the train stopped under those circumstances in the area where the block signals were reported inoperative?

A. He would have to go back and flag.

Q. Because he would know, automatically, that he couldn't depend on a block signal?

A. That is right.

Q. Mr. Clark, after this test to Mr. Smith was given—let me ask you first, when you went back to where Mr. Smith was after he fell and was still down on the ground, can you tell us whether or not you inspected the various areas where you had seen him fall?

A. After Mr. Smith had departed from the scene with Mr. Baumberger and Mr. Delk, I went back to each location and inspected the area around there.

Q. What, if anything did you find, Mr. Clark?

A. I found normal road conditions, such as some of the ballast had fallen down into the area between the two tracks, and I found a couple of sticks. I think one of them —well, I wouldn't say how long they were. I think maybe [fol. 345] a foot, foot and a half in length, and I used those as markers to designate the spot or the area, the general area where he had fallen.

Q. Was there anything else you found when you inspected the area?

A. Nothing, only ordinary roadbed.

Q. Mr. Clark, after this test was given to Mr. Smith did you go out with photographers and take pictures at various points along the way where this test was given?

A. I did, sir.

Q. Do you remember how long it was after the test was given that you went and took these pictures?

A. I think it was probably on the 20th, which would be seven days after.

Q. The 20th of September?

A. Yes, sir.

Q. I wonder if you would look at those pictures, sir. Are those the pictures that were taken, Mr. Clark?

A. Yes, sir; they are.

Q. And do they fairly and accurately represent the vari-out scenes shown in them?

A. They do.

Mr. Sullivan: We'd like to introduce these in evidence, your Honor.

Mr. Frates: I'd like to ask one question.

[fol. 346] By Mr. Frates:

Q. Mr. Clark, during that week do you know whether your maintenance crew went over there and cleaned up that area?

A. Yes, sir. The maintenance crew did no work.

Q. Did you check to determine whether or not there had been any work done?

A. I did; yes, sir.

The Court: I will admit the photographs in evidence as Defendant's exhibits.

Mr. Frates: No objection.

(The photographs referred to were thereupon marked, "Defendant's Exhibits E, F, G, H, I, J, K, L, M, and N," respectively.)

By Mr. Sullivan:

Q. Mr. Clark, will you step down in front of the jury here?— If you could start with Defendant's Exhibit E and hold it in front of you if you would, and explain where it was taken and where the test started from.

A. This white post with a number (indicating)—I don't think you can see the number, but it is 355 mile post.

Mr. Frates: They can't see them, and I can't see them.

The Witness: I'll start down here then. This is the 355 mile post (indicating). That's where the test began. This is the passing track, and the southbound main and the northbound main. And that, of course, is Peoples Water & [fol. 347] Gas Supply. This, as I said a minute ago, is the mile post 355. This is the passing track. This is the southbound main, and this is the northbound main track, and

this is Peoples Water & Gas Company. (Displaying exhibits to the jury.)

Q. Mr. Clark, how were these—referring now to Defendant's Exhibit F—how were these pictures taken? Is there any correlation between Exhibit E and Exhibit F?

A. Yes. As you can note at the end of this fence, you can see a car sitting right there, a tank car. And the tank car is sitting immediately north of this point there. That's the clearance point, and that's the switch that runs on to the southbound main track—I mean, the southbound passing track.

Q. Sir, referring to Defendant's Exhibit F here, the fence shown on the right of the picture is the fence by the gas plant?

A. Yes, that's correct.

Q. And that fence, then, Mr. Clark, is the same one that's —the far end of the fence in Exhibit E is the fence you see in the foreground in Exhibit F?

A. Yes, that's correct.

Q. Now, with reference to Exhibit G, do they correlate again, Defendant's Exhibit F with Defendant's Exhibit G?

A. Yes, that is a continuation of the track and the facili-[fol. 348] ties along the track that follows right on down for the entire length of the mile.

Q. If you take these pictures as they're lettered in sequence, the background in one picture will be the foreground on the next picture on down the track.

A. That's correct.

(The witness resumed the witness stand.)

Q. Now, Mr. Clark, you said earlier that you had marked the places where Bert Smith fell.

A. I had.

Q. Are they indicated on these photographs, sir?

A. Yes, they are.

Q. Maybe you better step down again and show them to the jury, Mr. Clark—

A. —This marker right here (indicating) was in the immediate vicinity of where Mr. Smith fell.

Q. That's on Defendant's Exhibits L, M and N.

A. Yes. That is the first time, in the immediate vicinity where he had fallen.

Mr. Frates: How about let's putting "1" on that, if that's the first time.

By Mr. Sullivan:

Q. That black thing sticking up there, Mr. Clark—
A. Yes, it is.
Q. —is this marker here?
[fol. 349] A. Yes.

Mr. Frates: Wait a minute. I asked them, please let's put "1" on there so there won't be any confusion there.
Mr. Sullivan: We're talking about Defendant's L.
Mr. Frates: Mr. Clark, would you mind putting "1" on there, please, Mr. Clark?
Mr. Sullivan: Your Honor, I object to Mr. Frates—
The Court: I will sustain it.
Mr. Frates: Your Honor, we have three pictures and three falls. My only idea was it would make it clearer in summation, and to the jury. If Mr. Sullivan objects, I ask Mr. Clark to do it on my part.
Mr. Sullivan: Your Honor, I object to this continued interruption on my examination. Mr. Frates can have every opportunity to cross examine him.
The Court: I will sustain your objection.

By Mr. Sullivan:

Q. Go ahead, Mr. Clark.
A. And in this second picture this is what's known as a whistling post. It's used as an indication that the engineer should sound a whistle for the next road crossing. And it was approximately opposite this post between the southbound and the south passing track where he fell the second time. If you will notice, the marker further down the track indicates the spot where he was finally picked up.

Mr. Frates: What exhibit is that, please, sir, for the [fol. 350] record?
The Witness: M. And this third picture is a close-up of the final spot that he fell, which is denoted by this marker.

This was the whistling post that I had reference to that was just about opposite the whistle post where he had fallen the second time. And this is the third place. In other words, that's the place where we picked him up.

Mr. Frates: May I see them, please? That's N.

Let me mark these, Mr. Sullivan, will you please? They're so small it's difficult for us all to see them.

By Mr. Sullivan:

Q. Mr. Clark, with reference to Defendant's Exhibit I, can you point out to the jury the block signal there?

A. This is a block signal (Indicating) for use for trains operating on the northbound main. This is the reverse side of the mast and it's on the other side of this mast that the light indications are located.

Q. This is for what track, Mr. Clark?

A. Northbound main track.

Q. If a train had proceeded beyond this in a northerly direction, a flagman would then have to go to the other side of this—

Mr. Frates: Your Honor, I object to that as a leading question and a conclusion of Mr. Sullivan. If he wants to ask him a question he should ask him a question, but he's [fol. 351] stating a fact and he's calling for a conclusion.

Mr. Sullivan: I'll withdraw the question, your Honor.

By Mr. Sullivan:

Q. Mr. Clark, in order for a flagman of a train that had proceeded beyond this block signal to see whether the block was operative or not, where would he have to go to see?

A. To a point that would be south of the block signal and that he could see the other side of the mast.

Mr. Sullivan: I have no further questions, your Honor.

The Court: I will request that we go ahead with the cross, and I'll give the pictures back to the jury at a later time to look at them, in the interests of our time.

Cross examination.

By Mr. Frates:

Q. Mr. Clark, you're not talking about the block systems. You don't mean to leave the impression with this jury that the block system works and that the trains can run by it even if some of the bulbs are out, do you?

A. Please repeat that question.

Q. You don't mean to leave the impression to the jury, in answer to your question of Mr. Sullivan about the block system, that if some of the bulbs were out the trains would just go on by the block system. You don't mean to leave that impression, do you, sir?

A. Absolutely not.

[fol. 352] Q. Because that isn't true at all, is it?

A. That's right.

Q. Let's show the jury what happens when one of the lights go out. Let's say these are the three block signals—and, incidentally, could I see those orders that refer to the block system? You put them back in your pocket. Let's have them marked for identification.

The truth of the matter is that when something goes out on one of these, the block system goes into its most restrictive element which stops the train; isn't that right?

A. A dark indication or no indication at all is the most restrictive indication of any signal.

Q. Mr. Clark, would you answer my question, that when a bulb goes out on some of these lights and they have bulbs in them—that puts them back here, the most restricted signal which stops the train, doesn't it?

A. No, it doesn't affect these other blocks at all. If a bulb went out in this mast up here it wouldn't affect the other blocks back of it. It would just be a dark block.

Q. And what does a dark block mean?

A. That means absence of normal indication of a light.

Q. Aren't they all on a circuit? This is out of your field, isn't it?

A. That certainly is. You're getting me a little bit—

[fol. 353] Q. You're not the signal maintenance man. These are all on a circuit and when this light goes out here, it puts a restriction on these back here, doesn't it?

A. Now, as you said, I'm not a signalman and I don't know whether they're on a circuit or not because I think that they're on each one—individually operated by their own blocks.

Q. Mr. Clark, you know for a matter of fact, that's not the way they operate, is it?

Mr. Sullivan: Just a minute. It's argumentative. If he wants to ask Mr. Clark about it, well and good, but—

The Court: Sustain it.

By Mr. Frates:

Q. Who is the signalman here on the railroad?

A. Mr. Stevens in St. Augustine is the—

Q. Who's the signal maintenance man here?

A. I think its Rithmeyer. I don't know who it is because my jurisdiction don't start till we get to Little River.

Q. These men are all available, of course, aren't they, to testify in this trial?

A. I imagine. I assume that there's somebody around there.

Q. And as you say, you're not familiar with these.

A. That's right.

[fol. 354] Q. And you don't purport to tell the jury how these things work?

A. I certainly do not.

Q. You do know that when one of them goes out, it goes into a restrictive, which is a stop signal; right?

A. Yes, it's a stop signal.

Q. If this was a red light, you know this much, even if this was a red or stop signal and the red went out and left a black, it would still put this one caution, wouldn't it?

A. Again, I'm not a signalman; I'm sorry. I've never checked them.

Q. Mr. Clark, you were in here testifying under Mr. Sullivan's questions as to how these block signals work. Now, you know from your operation, don't you know as trainmaster?

A. I know from my operation, when I was running on a train that if we came up to a block and it was red, we stopped, naturally.

Q. Or if it was black you stopped?

A. Or if it was dark we stopped. That's the most restrictive signal.

Q. That's right.

A. But what it does to the block back of it, I couldn't tell you if it's out. Now, if it's a red block, the one back of it will be yellow.

Q. Then it's all on a circuit, isn't it?

[fol. 355] A. Well, I presume that the masts are, but as far as the power that comes to operate them, I think that they're all on a box.

Q. But if you have a red bulb that's burnt out, and the bulb is not burned but you have a circuit here, then this one is going to work. It's going to show the yellow, is'nt it?

A. I don't know. I guess it will.

Mr. Sullivan: Your Honor, if Mr. Frates wants to qualify Mr. Clark on this, well and good, but to argue with him on the one end that he knows nothing, and then to try and force answers out of him on the other, I think is improper.

Mr. Frates: Your Honor, I think on cross examination of this witness I have the right to do it. They bring him and purport to set him up as an expert on these things and tell what a flagman is supposed to do, and now it develops he doesn't know how it works.

The Court: Let's not argue any more in front of the jury. I'll overrule the last objection. Let's go ahead.

By Mr. Frates:

Q. Mr. Clark, do you know if there's somebody in town right now that's acquainted with how this signal system works?

A. There's always someone that's in the vicinity to take care of any signal failures.

Q. I wonder if we could get someone here who would [fol. 356] be familiar with how this operates?

A. If you call Mr. Norwood I'm sure he'll know who it is. It's just like I say, I don't have anything to do with this territory until it starts from 79th Street.

Q. Are you familiar with the signal book which Mr. Sullivan—

A. Yes.

Q. Do you know all of the statements in there?

A. Well, I use it as a reference. I mean, I don't try to remember it verbatim.

Q. I realize that, sir.

A. I just use it for a reference.

Q. Do you have your book there, sir?

A. No, I don't have.

Q. Would you read this? It's an interlocking plan, isn't it? It's an interlocking system. Are you familiar with that?

A. What?

Q. I'm reading from page 11, but the whole signal system is an interlocking signal system, isn't it?

A. Well, on interlocking system it would vary because, in other words, we have an interlocking system at Port Everglades.

Q. Would you answer my question, Mr. Clark? Is this an interlocking system?

[fol. 357] A. Yes, it is.

Q. It's so constructed, isn't it, that the failure of any part controlling the operation of a signal will cause it to display its most restrictive indication?

A. That's correct.

Q. We won't go into that. Can you tell us the man's name?

A. Rithmeyer is the local signal maintainer.

Q. Would you mind, sir, if we have a recess, calling him and seeing if we can get somebody from the department here?

A. No, I wouldn't mind.

Q. Now, going back—

The Court: Mark the papers for identification.

(The documents referred to were thereupon marked, "Plaintiff's Exhibit 1B for Identification.")

By Mr. Frates:

Q. I notice one of these here—

Mr. Sullivan: Your Honor, I think we ought to introduce them if there's going to be any interrogation about the particular documents, as our exhibits.

Mr. Frates: We can put them in.

By Mr. Frates:

Q. You put out these reports when there's an inoperative signal, and you tell the engineers that it may be passed under full control without stopping. That's the report that you put out.

[fol. 358] A. I don't put those out, Mr. Frates. That's put out by the chief train dispatcher. I don't—

Q. Would you read that one? That's the one you brought in to identify.

A. Yes.

Q. So when they don't work they cause them to stop and that's the engineer's authority to go ahead without stopping.

A. That is correct.

Q. Now, you have a maintenance crew. I assume that when they are inoperative that they fix them immediately, don't they?

A. Just as soon as they can get to them to repair them.

Q. How long does it take them to get to them? Do you have an emergency crew there?

A. No, just the regular maintenance force. Of course, we have signal gangs, but I think it's two signal gangs and they operate over the entire system.

Q. Can you tell us from your knowledge, how long it takes them to get these things fixed—these automatic block signals?

A. Well, it would depend on the weather, or it would depend on the availability of the employees to go repair them, and the distance they were from each section.

Q. Well, can you give us an idea of the longest period [fol. 359] of time that you recall one being out that you—

A. Well, I've seen them out for two or three days.

Q. Two or three days?

A. Yes.

Q. Your lights out on your automatic signal system?

A. Yes, sir. I think—probably, these orders—the dates are right there. If you care, you can look at them and see. I don't know; I haven't checked them.

Q. But your recollection is it's two or three days.

A. I've seen them that way.

Q. And that, of course, is installed as a safety feature, is it not?

A. An additional safety.

Q. An additional safety. In other words, if it's working properly it's the most modern and up-to-date feature that they have.

A. That is correct.

Q. In some of our big northern railroads they run trains right on top of each other with block systems, don't they?

A. That's a centralized train control, and it's a different feature than this automatic block system.

Q. Yes, sir, but the basic idea is the same. It's block signals.

A. Yes.

[fol. 360] Q. They're centrally controlled but as a block system.

A. Yes, that's correct.

Q. And they run those without anybody on them; trains at high rates of speed run in our heavily populated metropolitan areas.

A. That's true.

Q. You're familiar with that, aren't you?

A. That's true.

Q. And the lights and things of that nature are of the same general nature you have here.

A. That's right, principally.

Q. Now, Mr. Clark, during the time that Bert Smith has been a flagman for the Florida East Coast, since 1920, I'll ask you to tell this jury whether or not he ever received any demerits for failure to go back from the rear of a train.

A. I do not know. All I can speak of, Mr. Frates, is the fact that for the last year or 13 months that I've been—

Q. Mr. Clark, would you answer my question? Did you have his personnel file here?

Mr. Sullivan: Your Honor, I think he has answered the question. I don't think Mr. Frates can—

Mr. Frates: I asked him a question, your Honor. The answer is yes or no.

Mr. Sullivan: If we're going to have a speech I think [fol. 361] the jury—

Mr. Frates: We're not having a speech.

Mr. Sullivan: We certainly are.

The Court: My understanding of the question was, you asked him the question and he answered, did he not, that he did not know? Let's proceed from there.

By Mr. Frates:

Q. Did you bring Bert Smith's personnel file here?

A. No, sir.

Q. Where is Bert Smith's personnel file?

A. I do not know. Attorney Sullivan had it. I didn't have it.

Q. Attorney Sullivan has it?

A. Yes.

Q. Have you examined it?

A. I haven't looked at it, other than when the Judge marked the papers yesterday to be pulled out and entered. I pulled those out and I didn't read the rest of them.

Q. That's the one that we had on the subpoena.

A. That's correct.

Q. Now, to your knowledge, has Bert Smith ever received a demerit for failure to go back of the train?

Mr. Sullivan: Your Honor, I object to the question as repetitious.

Mr. Frates: That was not the question.

[fol. 362] By Mr. Frates:

Q. To your knowledge, has he ever?

The Court: I will permit the witness to answer the question.

By Mr. Frates:

Q. Has he ever received a demerit?

A. Not to my knowledge. I do not know.

Q. To your knowledge, he has not?

A. He has not, to my knowledge, received any demerits.

Q. Now, Mr. Norwood—what is his position with the railroad?

A. He's terminal superintendent.

Q. And he's here in Miami, isn't he?

A. That's correct.

Q. And Hamilton was here in the same capacity as you for a while, was he not?

A. That's correct.

Q. The man who wrote this other letter.

A. That's correct.

Q. Where is Hamilton?

A. He's superintendent in New Smyrna Beach.

Q. And he's in the State, is he not?

A. Yes; I talked to him this morning.

Q. You talked to him this morning. Where was he?

A. In New Smyrna Beach.

Q. Demerits are given for a violation or failure to com- [fol. 363] ply with your rules, are they not, as far as the flagman is concerned?

Mr. Sullivan: Just a minute, your Honor. This isn't anything brought out on direct examination. Again, if Mr. Frates wants to go into it, I think he ought to make Mr. Clark—

Mr. Frates: For this question I'll make him my witness.

Mr. Sullivan: For the whole line. We're so far afield—

Mr. Frates: I don't think we're so far afield. I think it's very material to the issues in this case.

The Court: I don't think these are proper questions on cross examination. If you have completed your cross, we'll go into your direct examination for these questions.

By Mr. Frates:

Q. Mr. Clark, demerits are given for failure to comply with the rules, are they not, sir?

A. Yes.

Q. The rules are these rules set out in the books and various bulletins and train orders?

A. That's correct.

Mr. Frates: Thank you.

OFFERS IN EVIDENCE

Mr. Sullivan: We'd like to introduce all of these, your Honor.

The Court: Any objection, Mr. Frates?

[fol. 364] Mr. Frates: No, sir.

The Court: Admit these items and mark them as one exhibit for the defendant.

(The documents referred to were thereupon marked, "Defendant's Exhibit O.")

Redirect examination.

By Mr. Sullivan:

Q. Mr. Clark, referring to Defendant's Exhibit O, you're familiar with these train orders, are you not, sir?

A. Yes, I am.

Q. Both as trainmaster and conductor and trainman.

A. Yes, I am.

Q. I'm reading one dated September 7, 1955, reading, "Following automatic block signals reported inoperative and may be passed under full control without stopping. Conductor must require his flagman to read this order." It says, "Southward 331.9 and 333.1. Northward 333.2 and 334.4." Now, what's the purpose, Mr. Clark, of having a flagman read that order?

Mr. Frates: Your Honor, I object to this, again, as a conclusion. He doesn't issue them. We're operating the railroad by the rules, as he has said.

The Court: I will sustain the objection to the last question.

The Witness: Would you ask that question again?

The Court: I sustained the objection, Mr. Clark.

[fol. 365] Let's go ahead.

Mr. Sullivan: Your Honor, on what basis, if I may ask? If it's on the basis that Mr. Clark hasn't sufficiently qualified, I'll ask him some additional questions.

The Court: I think we've been all over this. I'm sustaining it because I don't think it's proper to go into it any further.

Let's go ahead.

By Mr. Sullivan:

Q. Mr. Clark, suppose you have train orders out, such as those, and the train stops in an area where it's been called to the flagman's attention that the signal behind him is inoperative. What's he supposed to do under those conditions?

Mr. Frates: Your Honor, this is repetitious. We've been over it several times. I've objected to it. There's no rule. He's said that's what he thinks, and we're just plowing up the same—

Mr. Sullivan: Mr. Clark is the trainmaster.

Mr. Frates: I'm objecting on the ground it's repetitious.

The Court: I will sustain it on the ground it's repetitious. He's previously testified.

Mr. Sullivan: No further questions.

Mr. Frates: I have no further questions.

Your Honor, could we get somebody here who knows [fol. 366] something about signals?

Mr. Sullivan: Your Honor, I'd prefer to have subpoenas issued.

The Court: The defense requests that a subpoena be prepared. Mr. Clark, prepare a subpoena.

Mr. Sullivan: Your Honor, at this time we'd like to introduce a report from the United States Weather Bureau indicating the weather on September 13, 1956, between 9 and 10 a.m.—

Mr. Frates: We have no objection to the introduction of it.

The Court: I'll admit it and mark it as a defendant's exhibit in evidence.

(The report referred to was thereupon marked, "Defendant's Exhibit P.")

Mr. Sullivan: Gentlemen, this is a certificate from the United States Weather Bureau which indicates that at the "Weather Bureau office, 1410 Northeast 2nd Avenue, Miami, Florida, on September 13, 1956, between the hours of 9 a.m. and 10 a.m., the following observations were made: The temperature was 80 degrees, the wind from the northeast at 22 miles an hour, the relative humidity was 68 per cent, and the sky coverage was 8/10 clouds."

Mr. Frates: Mr. Sullivan, to save some time I wonder if Mr. Clark could call the person and have the subpoena [fol. 367] given to him when he got here, so we won't have to sit and wait for him.

Mr. Sullivan: No objection to that.

Your Honor, we'd like to read certain portions of the deposition of Royce S. Delk who lives in New Smyrna Beach.

The Court: Mr. Frates, is there any objection to the offer of the deposition?

Mr. Frates: Yes, sir; I think they ought to put all of it in. It will require us to put parts of it in on rebuttal if he doesn't put it in. He has to put in any part that's material. He can't just read a couple of sentences out of there.

The Court: I will note the offer and we'll go ahead.

Mr. Sullivan: Gentlemen, this is testimony under the same circumstances as Dr. Manson's deposition yesterday. This is a witness who lives in New Smyrna Beach. This is the testimony of a recorded statement of his testimony that was taken prior to the trial. I'll read the questions and answers just in sequence, without indicating—I won't say "question" and "answer." I'll just read them on down the line. I'll start on page 2, Mr. Frates.

"Q. Would you state your name, sir?

"A. Royce S. Delk.

"Q. Where do you live, Mr. Delk?

[fol. 368] "A. Route 1, New Smyrna Beach, Florida.

"Q. Do you work for the Florida East Coast Railroad at the present time?

"A. Yes, I do; in the capacity of brakeman and conductor.

"Q. As of the present time are you working as a brakeman or as a conductor?

"A. Brakeman at the present time.

"Q. It all depends on what your seniority entitles you to?

"A. I work six to eight months a year as conductor and about four months as trainman.

"Q. How long have you been with the Florida East Coast Railway?

"A. Since February 2, 1941."

Mr. Sullivan: Now, I'd like to move over to page 6.

"Q. How long did you serve as general chairman of your particular union?

"A. Well, I was filling an unexpired term from August, 1954, until January 1, 1957.

"Q. So you went out of office, so to speak, as of the first of the year?

"A. As of the first of this year, yes.

"Q. Do you hold any position with that organization now?

[fol. 369] "A. Well, yes. I'm vice-chairman. That is, we have a general chairman. Then we have a vice-chairman. In other words, if the general chairman is off the property, at a convention or anything, then I'm in full control while he's off the property."

Mr. Sullivan: Now, down at the bottom of page 9.

"Q. Do you remember when Mr. Smith called you?

"A. The date I wouldn't, but it was the day before the field test was supposed to take place.

"Q. That was when? That was sometime in September of last year, was it not?

"A. Yes. I believe it was. That would have been on September 12 that I was contacted by Bert Smith by Bell Telephone, to be at Miami, Buena Vista yard office at 8:00 a.m., September 13.

"Q. You said by "Bell Telephone." You mean the railroad telephone?

"A. No, the Bell Telephone.

"Q. You mean private 'phone?

"A. Private telephone.

"Q. Did he call you at your home, sir?

"A. Yes.

"Q. And he told you that he was to make this test the next day?

"A. The next day, and requested my presence.

[fol. 370] "Q. Did he say anything else?

"A. Well, if you knew Bert Smith, he talked for about two hours, but, nevertheless, that was all.

"Q. I will not ask you to reproduce the conversation; but in terms of the substance of it did he say anything else?

"A. Well, he just informed me that he had received a letter from the trainmaster that they were going to give him some kind of field test at 8:00 a.m., September 13, and that he didn't know what kind of a field test it was or anything about it, and requested that I be on hand to represent him at whatever might come up.

"Q. Did he advise you that Mr. Baumberger was going to be there, too?

"A. Yes, he did.

"Q. And then you came down to Miami for the test?

"A. Yes.

"Q. Where did you meet Bert Smith the morning this test was held?

"A. Well, I believe I was staying at the—well, just say that Mr. Baumberger picked me up at the hotel and we went around and met Mr. Smith at the yard office at 29th Street.

"Q. Was there any conversation between you at that time that you can recall?

"A. Yes. You mean between Smith and myself?

"Q. Yes, and Baumberger—the three of you.

[fol. 37] "A. Well, we talked it over amongst ourselves. We were quite concerned and worried what was coming off, and after we stood there for a while Mr. Clark and Road Foreman Johnson, I believe it was, came up and told us what kind of field test this was going to be, which was mainly to walk a mile, and he in-

formed us where it was to be and he requested that we meet him out at this particular place.

"Q. Let me go back a minute before you go to that. Can you recall anything specific that was said before Mr. Clark came up, when you and Mr. Baumberger and Mr. Smith were talking?

"A. No, I don't.

"Q. You were just wondering what the nature of this test was going to be?

"A. That's right.

"Q. And Mr. Clark came up and told you about it?

"A. Yes.

"Q. Who was with him, if anyone?

"A. Mr. Johnson, Road Foreman of Engines; I believe it is J. H. Johnson. I'm not sure.

"Q. Was Mr. Bader there, too?

"A. Not at this time, I don't believe. No.

"Q. And he said that the test was to have Mr. Smith walk a mile?

"A. Yes, sir.

"Q. Where was it to be held?

[fol. 372] "A. Mile post 257, I believe it was, if my memory serves me right."

Mr. Sullivan: Skipping over to page 23, down toward the bottom, Mr. Frates—

"Q. Now, you got up to Mr. Clark and Mr. Johnson and turned around, and you said you saw Bert Smith fall; is that right?

"A. Yes.

"Q. Where was he, do you know, approximately, when you saw him fall?

"A. Well, he was a good distance from us. We saw him fall and he laid there for a few minutes and finally struggled up and, if I recall—yes, he started out again. Mr. Clark and Mr. Johnson and myself were sitting by the side of the right of way, if I recall—we might have been standing—watching Mr. Smith walk when he fell the last time.

"Q. How many times did he fall altogether?

"A. Three, the best I remember.

"Q. When you got up to—or down to, I suppose—mile post 357, if that is the mile post it was, do you know or would you be able to estimate how far Bert Smith had walked from the first time he had fallen?

"A. No, I wouldn't, without having my records to refer back to.

"Q. You do not recall any particular landmark or [fol. 373] anything like that?

"A. No. I believe I could go out there and walk it over again and show you approximately a few feet of where he fell.

"Q. Then you saw him get up and walk on a little bit more?

"A. That was the second time that I seen him fall. Yes. We saw him get up and he continued just a very short distance and you could just see the way that he fell, just like that. I made the remark to Mr. Clark and Mr. Johnson, I said, 'There's your field test now.' And I said, 'I think you have probably injured that man up there,' or some words to that effect.

"And I also said, I made the remark, I said, 'I'm not going to put up with this any longer. I'm going to make him stop, if he's not already hurt.'

"And we started—Mr. Clark started running, and I have a little heart condition and I didn't run, but I walked as fast as I could, and Mr. Baumberger was the first one to reach Mr. Smith and then we all—Mr. Hall, I believe, was the second man to him.

"Q. Mr. Hall?

"A. Luther Hall, wasn't it?

"Q. Was Luther Hall out there?

"A. Was it Luther?

[fol. 374] "Q. Was it Mr. Bader?

"A. Maybe it was Bader. I wouldn't say which one it was. There was one special representative or special agent out there. He was the second man and then maybe Mr. Johnson and Mr. Clark and myself got there, and Mr. Smith was in a pitiful state, I would say the word would be. He was slobbering at the mouth. He was just as purple, and it really frightened me.

"And Mr. Clark seen his condition. He was going over to call an ambulance but we finally got Mr. Smith up and helped him over to the side over there and got our car and rushed him to the doctor.

"Q. Did Mr. Smith say anything at the time you went back?

"A. Well, yes, he did. He was more or less out of his—he was talking irrationally. He was more or less out of his mind. I mean, he was in such pain and he was so worn out that the special agent told us—requested that we not let him take him in his car to the doctor. He wanted Mr. Baumberger's car to go to the doctor in.

"Q. Did he say anything else that you can recall—any other words?

"A. No. He seemed to be very incoherent.

"Q. Incoherent?

"A. Incoherent. You couldn't hardly understand him. He was in such a physical shape that he was more [fol. 375] or less out of—I wouldn't say that he was out of his mind. I've seen people with complete exhaustion or something like that. He probably didn't recall just what he was saying.

"Q. Did you look at or inspect the area where you had seen him fall?

"A. Yes.

"Q. What did you see there, if anything, Mr. Delk?

"A. Well, nothing. I would say that—I don't believe he tripped on any wire or anything. I believe he completely fell from exhaustion on the track. He was walking along on the side of the right of way and you could see where he might have stumbled on the rocks, the ballast along there, and just toppled over. I think it was from utter exhaustion more than anything else.

"Q. When you looked back and saw him before he fell the second time, was he walking on the outside of the track then?

"A. I believe he was, yes.

"Q. And that would have been to the outside of the south main track?

"A. Yes.

"Q. And he continued along the outside until—

"A. Yes. He continued. I recall seeing him walk. He would walk in the center of the track some; he would walk on the right hand side of the track. In other [fol. 376] words, he was trying to find some walking ground that was level, where he could walk in more or less comfort, than having to wade through the sand spurs and things like that.

"Q. I believe you said—correct me if I am wrong—that a little earlier—you were talking about the events leading up to the time Mr. Smith fell the first time and you said he was laboring. What did you mean by that?

"A. Well, I don't recall if I said that. I mean, he was walking along, Mr. Smith, and he weighed just a little bit more than I did, and it would be naturally harder for him to walk than it would be for you and I.

"Q. Did the walking seem to cause him difficulty or was it something else?

"A. Well, I would say it would be the roughness of the track or something like that. In other words, if they they were to have picked a paved road or some place like that for Mr. Smith to have walked on, it would have been much easier for him to walk than it would have been to walk on the ground.

"Q. Did you take Mr. Smith to a doctor, Mr. Delk?

"A. Yes.

"Q. What doctor was that?

"A. I don't recall his name without referring to my records. He was over on Flagler Street. I would probably know it if I heard it.

"Q. How did you happen to go to that particular [fol. 377] doctor?

"A. Well, I believe he's a company doctor, the East Coast Hospital Association doctor.

"Q. Did you suggest him, or Mr. Baumberger or Mr. Smith?

"A. No. I believe Mr. Smith suggested it because he had been going to this doctor prior to this field test.

"Q. Mr. Delk, I do not want to ask you about all the categories, but I want to ask you particularly about a trainman who is working as a flagman. Can you tell me in a general way what his duties are?

"A. Well, his duties primarily is to protect the rear of the train that he's flagging, in case of necessity.

"Q. Am I correct when I say that the thing that he is there for is to prevent a train from coming from behind and running into the train ahead of it; that that is the thing he is primarily concerned with?

"A. Yes. That's primarily his duties, yes.

"Q. So that under any conceivable circumstances where one train could come from behind and run into the train ahead of it, the flagman is there to prevent that if he can?

"A. Yes. That's right.

"Q. And if there is a crossing accident and the train is stopped, it is customary, is it not, to have them do what they call "put a flagman out" or send him back to the rear?

[fol. 378] "A. Yes, sir. The flagman rides the rear at all times, on passenger trains, especially, and as you said, at a crossing accident he would immediately go back a sufficient distance to insure full protection of his train.

"Q. Is there any rule of thumb or is there any way of stating how far back a flagman should go?

"A. No, sir. As I said, he would immediately go out a sufficient distance to protect the rear of the train. Sufficient. Now, if you can break that down into feet, it's more than the railroad will ever do.

"Q. Would it be customary, say, for a flagman to go behind the nearest block signal behind him?

"A. I would say it would be for him to go back a sufficient distance to protect his train under the existing conditions.

"Q. Well, can he tie that in with a block signal?

"A. No.

"Q. The block signal, if it is functioning properly, will indicate whether there is a train ahead on the same track, will it not?

"A. Yes. If the flagman—we're not too smart, but if we go back a sufficient distance to see that block, we know that there's our train in the block; if we walk back beyond the rear block and see a red block, we know

that's causing that, because our train is in that block. [fol. 379] "Q. Well, just dealing with the block system, there may be two trains on the same set of tracks. If one train is away down the track from the other the block would be green, would it not?

"A. Yes.

"Q. If it is a shorter distance—I do not know what it is—it would be yellow?

"A. Well, on some portions of this railroad we have a three-block system, I believe it is. We have a green. Then, like you say, if the train is quite aways ahead, we will have a flashing yellow; and then the next block will be a permanent yellow; and then, of course, the next block will be a red block.

"That gives us additional protection for the rear of the train. That's not in operation over the whole railroad, but it is in operation on some parts of it.

"Now, this down here—as I said, I'm not familiar with it, but imagine that's the green-yellow-red down here.

"Q. Would you consider it good practice for a flagman to go back in an emergency at least to the point where he can see at least the block behind him to see what that block showed?

"A. I would say he should go back a sufficient distance to protect the rear of his train.

"Q. What would that be in that case?

"A. A sufficient distance to protect the rear of his [fol. 380] train.

"Q. Have you worked as a flagman on passenger trains?

"A. Yes, sir.

"Q. Have you ever had occasion to go back?

"A. Well, when a train stops, I immediately get my flagging equipment and go back a sufficient distance to insure full protection of the rear that I am flagging. You know that's the rule book and you're not going to get me to say nothing else. I'll tell you, I'll set here and say 'sufficient distance to insure full protection of the train' all day. That's the rules. The blocks don't enter into it even whatsoever, sir. It doesn't enter into our flagging. We flag according to the rules.

"Q. What I am trying to get at—I am not going to ask you to change the words—I am trying to ask you if you can recall any specific instances where you have worked as a passenger train flagman and had occasion to go back in an emergency. If you can remember an instance like that, tell me about it and tell me how far you personally went back. You understand the question? It is in three parts, really.

"A. Yes. I will say that I have had cases of that kind where I had to go back. The train stopped that I was flagging; but I did not know the circumstances and there might be a train following, and that I would go back a sufficient distance to insure full protection of my [fol. 381] train. Now, that could have been—

"Q. Who decides what is sufficient distance?

"A. I do. It rests fully on me. In our rule book there is no mile. On some railroads—as I recall, I worked on the Southern Pacific Railroad in 1942 and their rule books state—this is strictly from memory; it has been 15 or 16 years ago, as I recall it. Their rule book specifically states that you will go back a mile or a mile and a half, I believe it is; go back a mile and a half and place two torpedoes and then proceed back half a mile or a mile and place one torpedo, and stay at that one torpedo.

"Now, they've got their rule book down to feet. I mean, they tell you what is a sufficient distance. But our rule book here that we're operating on, as I recall the wording of it, says that the flagman will immediately go back a sufficient distance to insure full protection of his train.

"Now, they don't break it down and they leave it, I would say, more or less to our judgment."

Mr. Frates: Go ahead and read the rest of it, Mr. Sullivan. You can't stop in the middle of an answer. Your Honor, I request that he go on and read the rest of that answer. I never heard of this being done.

The Court: If it's part of a question and answer, I think it should be completed.

Mr. Frates: I have several other questions.

[fol. 382] Mr. Sullivan: No objection to them, your Honor, if Mr. Frates wants to read them.

Mr. Frates: It's on page 33.

(Reading of deposition, continued, by Mr. Sullivan:)

"Of course, when we're flagging a train out there we know what's going on. We work under train orders. We have a time table and we know—we have orders on extras and we know what's right close behind us, usually. And if we're going along there and we stop all of a sudden, cause unknown, and we know in our mind that there's no train following us at all at this particular time, we would not go back as far as if we had known that there was a train immediately behind us. Then we would go back, I would say, farther than we would if we knew there wasn't a train back there.

"Q. A couple of last questions. Have you worked with Mr. Smith yourself?

"A. Yes; yes, I have. Mr. Smith has flagged a passenger train for me.

"Q. Can you remember the last time that happened?

"A. No, I couldn't.

"Q. Would it have been, say, in the year 1956, or do you know?

"A. I wouldn't even make a guess of when it was, but I do know that Mr. Smith has flagged two or three [fol. 383] times for me on a passenger train.

"Q. Do you work with him regularly?

"A. No, sir."

Mr. Frates: Your Honor, I request Mr. Sullivan to read, in view of the fact that he's read certain portions, that he read the several parts that he's omitted here on pages 18, 20, 21 or 22.

The Court: I've admitted the entire deposition.

Mr. Frates: May I read these portions of it?

The Court: Yes.

Mr. Frates: Referring to the test, I'm reading from page 18—

"Q. The three of you started off together?

"A. Yes.

"Q. What happened after that?

"A. Well, we walked a short distance and Mr. Smith tripped on a piece of wire. It was kind of a hoop. It was a solid piece of wire. It was a ring of wire—I believe it was. He tripped; got tangled up in that and fell from getting tripped on this wire, and he cussed a little bit and finally got up and started walking agin; and he was, even at that short distance, he was laboring quite a bit; and Baumberger and myself continued to walk ahead, and every once in a while he would turn back around and look at Smith, and he was plodding along there, trying his very best to perform the field test for them.

[fol. 384] "And we went on down to the mile post and we walked it in—I don't recall just the exact time, somewheres in approximately twenty-three minutes, after stopping and helping Bert up the first time."

Mr. Frates: Then on page 20—

"Q. You say Mr. Smith, when you saw him fall, seemed to get mixed up in a piece of wire?

"A. Yes.

"Q. Do you know what kind of a wire it was?

"A. No, I didn't examine it myself. I saw it. It was more or less of a kind of—well, something like a wire that would go around a nail keg or something on the same order as that.

"It was in a loop, wired together. It had no end to it.

"Q. He got his foot caught in it?

"A. Yes. He got his foot caught in it.

"Q. Were there any other pieces of wire or loops along the right of way?

"A. Oh, yes, a great deal of it; quite a bit of it—rocks and weeds.

"They could have picked the whole railroad and never have picked a worse spot to have had a man walk than they did."

Mr. Frates: On page 22—

[fol. 385] "Q. What about weeds in that area?

"A. Well, it was very weedy in that area. It was in September and I don't think the weed burner had been through there, and the weeds and the sandspurs were quite bad. It was so bad that you couldn't walk on the side of the right of way in comfort. I know, if I recall, me and Mr. Baumberger walked mostly down the center of the track, walking on the crossties to keep out of the sandspurs and the weeds alongside of the right of way."

Mr. Frates: That's all, your Honor.

Mr. Sullivan: Your Honor, I'd like to read certain other portions.

Mr. Frates: I'd like to offer the whole thing.

The Court: I will admit the whole thing and you can read any portions of it.

Mr. Sullivan: Referring to Delk and Baumberger walking—

Mr. Frates: What page, Mr. Sullivan?

Mr. Sullivan: 19.

"Q. Was that by your own watch, Mr. Delk, or—

"A. I believe we all compared watches when we got there.

"Q. You mean before you started; when you arrived?

"A. Yes. When Baumberger got there I believe we all checked. There was some comment on the length of [fol. 386] time that it had taken Mr. Baumberger and myself; and we turned around and we saw Mr. Smith fall again.

"Q. Can I interrupt you again?

"A. Yes.

"Q. Do you know approximately where it was in that one-mile stretch that Mr. Smith fell the first time? Would you estimate or pinpoint that?

"A. I could probably go out there and show you approximately where it was, but I wouldn't say from memory approximately.

"Q. Was it, say, in the first quarter mile or in the first half mile? Would you be able to pinpoint it that way?

"A. I don't believe that Mr. Smith actually ever got —walked the full half mile distance, as I recall. I don't recall just how many feet. As I say, I have records that the general chairman now has that's available to me that would tell me a bunch of this stuff.

"Q. Is there any way that you can estimate as to where he fell the first time? Was it in the first quarter mile?

"A. It would be in the first quarter of a mile, yes.

"Q. Did either you or Mr. Baumberger fall at all?

"A. Oh, no."

Mr. Frates: I'd like to point out that that's where I then read the next question and answer—

"Q. You say Mr. Smith, when you saw him fall, [fol. 387] seemed to get mixed up in a piece of wire?

"A. Yes.

"Q. Do you know what kind of a wire it was?"

Mr. Sullivan: Your Honor, let me finish. Mr. Frates has done the same thing I've done. Mr. Frates has done the same thing, your Honor.

The Court: Let's go ahead.

Mr. Sullivan: On page 21—

"Q. I want to ask you about the right of way in that area. Is that any better or any worse than the right of way anywhere else along the line?

"A. I would say it was a little worse than average.

"Q. In what way, sir?

"A. Well, there's, like I say, a lot of industries along the right of way and they throw trash and wire and stuff along the right of way. That would be my only way of seeing that.

"Q. What about, say, the condition of the ties and ballast? Was that any better or any worse than it would be elsewhere?

"A. Well, the ballast I encountered—usually our ballast is more or less of the same size, but after walking this particular place it seemed to me that the ballast was, not intentionally, I would say, but there seemed to be a lot of big rocks—you know, things like that in it.

[fol. 388] "Q. When you say 'big,' how big do you mean, Mr. Delk?

"A. Well, I would say some of them was three inches in diameter; four inches in diameter.

"Q. Again, could I ask you your estimation as to the size of the usual stone or rock that they use for ballast?

"A. Well, I wouldn't say off hand, but I would say inch and a half or two inch ballast. I don't know."

Mr. Sullivan: Then down below on page 22—

"Q. Where were the weeds? Were they between the grass or off on the side of the track?

"A. They were off on the side of the right of way, where a person would usually, normally walk.

"Q. Was there any path down the side?

"A. No, not as I recall.

"Q. Can you remember if there were any weeds between the rails or between the two sets of tracks?

"A. I don't recall at this time, no."

The Court: Are there any other portions of it you want to read, Mr. Frates, at this time?

Mr. Frates: No.

The Court: Are there any other witnesses you want to call, Mr. Sullivan?

DEFENDANTS REST

Mr. Sullivan: No, sir. The defense rests, your Honor.

[fol. 389] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Mr. Frates?

Mr. Frates: I'd like to have this signalman if he's—

Mr. Clark: I just called the office and Mr. Rithmeyer is on vacation and I don't know who is relieving him, and that information would have to come from St. Augustine from Mr. Stevens.

The Court: Take the jury out a moment, please, Mr. Bailiff.

(Thereupon the jury retired from the courtroom and the following proceedings were had:)

The Court: Do I understand our question to be that of whether or not if lights are out on one of the signal blocks that the light behind it, whether it turned yellow or not?

Mr. Frates: Well, your Honor, the question is that they put him on direct examination and I'd asked him a few questions, and then it develops about the signal block system, and on his direct examination it seemed to indicate that he was familiar with how it operated, because they brought in the train orders, and so forth.

And then on cross examination it determines by his own admission, he doesn't know how it works at all. I think—

The Court: Is there any part of it in question that possibly we can stipulate to in the interests of time?

[fol. 390] Mr. Frates: If Mr. Sullivan—I know the thing operates on an entire system, and when this goes out all through the whole unit, it throws up its most restrictive aspect.

The Court: Your position is that if the red bulb on this unit goes out the rest of them turn red?

Mr. Frates: No, sir. This flashes on to its caution or in a restrictive—

The Court: The one behind it doesn't do anything—

Mr. Frates: Because the one behind it wouldn't do anything. There are two, on a unit or train coming up here would stop or reduce its speed.

According to this book it would leave some indication

that this might go into red, too. And that's what I don't know, and I think that—

The Court: I don't think there's any question on the system that if the red bulb is out on this unit, that this one turns yellow. But I think if there's a conflict about that, we could get together on it. I thought you meant that because the red light is out on this one, that all of these would turn red.

Mr. Frates: No. This would go into its most restrictive phase, which would make this yellow, and I'm not sure that it doesn't make this one red on the same circuit because it's a complete circuit.

[fol. 391] I don't know exactly about this particular phase but there's a complete circuit and when there's a failure on any part of it, it goes into its most restrictive stop, and I think this second one on that circuit goes into stop, too.

I know it goes at least into yellow, and it would seem to me that that would be something that the jury should know, although the yellow would require them to reduce their speed.

I'm sure that in Miami here somewhere they have someone in the signal department who knows how this thing works.

Mr. Clark: Mr. Frates, if you pardon me for interrupting, I didn't understand your question that way. I thought you meant if it was dark the rest of them would go red. I could answer that.

But that was my interpretation to your question.

Mr. Frates: You didn't even know if there was a circuit, Mr. Clark.

The Court: Let's not argue.

What do you want to do?

Mr. Frates: I'll move the Court—I don't like to hold the thing up, but if we can't get someone from the signal system, we move to strike out all his testimony about the signal system and how it operates on the basis of his own testimony that he doesn't know.

Mr. Sullivan: Your Honor, all Mr. Clark testified to was [fol. 392] from his own observation of it. He didn't know

how it was set up electronically. He said as a trainman and conductor, he's made certain observations.

That was the sum and substance of his testimony. I would like also, to add, your Honor, from the time the trial started we have been sort of running errands for Mr. Frates. Dr. Lockwood cancelled— You requested me to call him. I have no particular authority to call him. He cancelled operations to come down here.

Other information was sought of us. Now, I don't feel we're required to go out and dig up witnesses all up and down the line.

Mr. Frates: No, but I think you are required, when you put someone on the stand and have him testify to the signal system workings, he ought to be qualified, and not leave the impression with the jury that he knows what it was.

And it wasn't until cross examination that he finally admits on the point on which he's been hanging his whole hat, that he doesn't even know how it works and what the lights are.

And I think it's of major importance in this trial how this signal system works.

The Court: I don't understand that. We've gotten off on this, and I've tried my best—the nature of it being a rather unusual type of lawsuit, in trying to understand it.

[fol. 393] But can't we agree that that system behind the one that's out is definitely yellow, and that would accomplish the purpose?

Mr. Frates: I think that would save time. It might be red, but I'll go along with the yellow on the thing if we can stipulate on that.

The Court: Do I understand that when the red bulb is out and it's dark and the train stops, that the one behind it is still yellow?

Mr. Sullivan: Is it, Mr. Clark?

Mr. Clark: Yes, it is.

Mr. Frates: Is it yellow, and not red?

Mr. Clark: It is yellow. If that block is dark, in a red position, it will be yellow on the next block, and the next block will be clear.

It's just the same as a red block.

The Court: Let's note that stipulation and go ahead now.

Is there any other rebuttal?

Mr. Frates: I'd like to have one other thing. When it is yellow what does that indicate to the engineer?

Mr. Clark: Reduce speed of the train.

Mr. Frates: To what? prepare to stop?

Mr. Clark: Prepared to stop; that's correct.

Mr. Frates: That will solve everything if we can make [fol. 394] that stipulation.

The Court: Is that agreeable to you, Mr. Sullivan?

Mr. Sullivan: Yes, your Honor.

The Court: Is there any rebuttal evidence to be heard before we charge this jury?

Mr. Frates: No, your Honor.

I want to make sure, your Honor, that you could do a better job in explaining it to the jury.

The Court: I will try my best to explain the stipulation to them, as I understand it, and you correct me if I'm wrong.

Do we want to hear any motions or matters now, and go into our charge conference.

Mr. Sullivan: Your Honor, there's one witness, if we can find him. We'll know in about 15 or 20 minutes. I'll ask your Honor to reopen the case.

Mr. Frates: I have no objection. I'll stipulate you can.

Mr. Sullivan: We're resting. And I'd like to renew my motions previously stated.

The Court: I'll note that, and at this stage I will reserve on it and submit it to the jury at this late hour of 12 o'clock Saturday.

Bring the jury in, please.

(Thereupon the jury returned to the courtroom, and the [fol. 395] following proceedings were had:)

The Court: To the members of the trial jury, just prior to your being excused from the courtroom the defense had rested.

Outside your presence we have entered into a stipulation

between counsel for the plaintiff and counsel for the defendant that in a situation where a block, under the block system—where the train moves into that area, that where a block is off or the red light is not burning, or for some reason there is a failure in that block, that the immediate block behind the one where the failure is will flash yellow, will stay on yellow, which flashing means to the approaching train or engineer, to reduce his speed immediately and prepare to stop.

Is that our understanding?

Mr. Frates: Yes, sir.

Mr. Sullivan: Yes, your Honor.

The Court: At this time we're going to have a charge conference outside your presence and we'll have a lunch hour and reconvene here for the closing arguments to you before I charge you on the applicable law for you to consider.

We'll break here for about an hour and then reconvene in the courtroom for you to hear those final arguments.

If you will step down at this time, you're excused, with [fol. 396] the same instructions I've given you before regarding not discussing the case or considering or dwelling on it until you've heard these arguments and the charge of the Court when we reconvene, and you are so instructed.

Will you step down at this time, and you are excused until 1 o'clock.

(Thereupon the jury retired from the courtroom and the following proceedings were had:)

Mr. Sullivan: Your Honor, in determining charges, I think there's an initial question. I don't know quite how to do it, but we are not agreed at the moment. I think it's a matter of law, really, as to what statute applies, whether this is a common-law case, or whether it's Federal Employers Liability.

The question in my mind is whether or not Bert Smith, under these circumstances, was an employee within the meaning of the Act. He certainly wasn't running on a train. This was a special test that was being given to him, and I have tried to find some law on it.

The one case I can find, which is partially persuasive—but it doesn't hit it on the head—is Borne against Southern Railway Company. It's a North Carolina case, 33 S.E. 2nd, 239. That is the case where they were giving an inexperienced engineer on an engine—they held he was not an employee under those circumstances.

[fol. 397] The Court: Had he been employed previously? Could you tell from that case?

Mr. Sullivan: I didn't look at it, sir. It indicates here that he was. "The fact that the plaintiff was an engineer employed . . ." ". . . and had been so employed for a long time prior to April 7, 1941, does not necessarily establish the master-servant relationship at the time of his debt . . ." and it goes on from there.

It isn't the same situation, factually. That's the only case I've been able to find, your Honor. Maybe Mr. Frates has something.

Mr. Frates: Your Honor, to me there's just no question about it. He was ordered out there by his superior, and he was performing the test in the scope as his duties or work as a trainman.

The Court: I'll be glad to look at this case and study it during the lunch hour, Mr. Sullivan, but I would indicate to you in my consideration, that it would be my disposition that he would be within the employee status, from what I have heard of the factual matter.

Mr. Sullivan: Your Honor, in submitting charges I didn't want to waive that question.

The Court: I understand that and I will—

Mr. Sullivan: Because in our Answer we did not admit that he was an employee.

[fol. 398] The Court: Probably one of the charges which the plaintiff requests that I charge on is that Federal Employees Act, and so I think your exception to that and your statement in the record that your exception in the charge conference if you don't think it's applicable, would certainly preserve and protect your rights on that.

Mr. Sullivan: Your Honor, on the other hand, if you are going to charge the Act does apply, I will want to submit

my own charges in the light of that ruling, but waiving the other.

Mr. Frates: I'll stipulate, by submitting the charge you don't waive your rights.

The Court: Without waiving your rights, it will be my disposition that I will charge on the Federal Employees Act.

Mr. Sullivan: Your Honor, some of those have been submitted in the alternative. We're asking for any one of them.

The Court: Would the record note that at this time the plaintiff has submitted to the Court six written requested instructions, and the defendant has submitted eighteen requested written instructions, although there are on No. 16, 16-A, B, and C; and on 15 there is a 15-A and B. On No. 16, there is a 6-A, B, and C.

Gentlemen, possibly in the best interests of your time and your having an opportunity—unless you feel you need [fol. 399] it to complete this before you eat, or make your plans for your argument—I can take these and read them over, and we can reconvene a few minutes before we start, and I'll make a ruling with the reports then, and hear your objections before we start to argue to them. Is that all right?

Mr. Frates: I prefer that, your Honor, if it's all right with Mr. Sullivan.

The Court: Let's meet back at my chambers about 1:00 or a few minutes before 1:00.

(Thereupon a recess was taken until 1:00 o'clock p.m., of the same day.)

[fol. 400] CHARGE CONFERENCE

After Recess

(The trial reconvened at 1 o'clock p.m., pursuant to the taking of recess, and the following proceedings were had as a Charge Conference in the Court's chambers and outside the presence and hearing of the jury:)

The Court: I'd like the record to note here that the respective attorneys are before the Court for the purpose of a charge conference.

PLAINTIFF'S REQUESTED INSTRUCTIONS

Let's first look to the plaintiff's requested instructions.

Mr. Frates: Judge, I want to ask for one additional one, and I'll get it typed up here, to the effect that if they give the test they pick out a place for it. Then there's a duty on them to make sure that it's a reasonably safe place.

I think we can discuss it when we come into the notice question.

The Court: All right. What about No. 1 of the plaintiff's?

Mr. Sullivan: It looks all right to me, your Honor.

The Court: All right.

Mr. Frates: The second one has been approved by most of the Judges here, not specifically, but I think indirectly, by the Supreme Court.

Mr. Sullivan: Your Honor, I think this paragraph in [fol. 401] here is correct, but it starts getting repetitious.

The Court: Doesn't this third paragraph cover pretty much the question that you were just asking about?

Mr. Frates: No, sir.

The Court: I see. Your objection to this one is that although you say it's the law, it's repetitious?

Mr. Sullivan: Yes, sir. I think it just strings it out unduly. I think the first paragraph is all right.

Mr. Frates: I think they're direct quotations.

Mr. Sullivan: We object to No. 3 because if you use the phrase, "assumption of risk" it's a legal phrase, and I think it's confusing to a jury. They don't know what it means, if you say the plaintiff doesn't assume any risks—to a jury that makes it sound like he isn't responsible for anything that happens.

I think it's confusing and misleading to a jury because it's a legal phrase.

Mr. Frates: It's the statute and I think that's exactly what it means. Now, it's a question of arguing the thing, either side.

But, certainly, we would have a right to request that the Court instruct in the words of the statute, and we've tried to just make it paraphrased to make it simpler. The statute specifically says that, "Such employer shall not be

held to assume the risk of his employment." I don't know [fol. 402] how you can make it any simpler. That's the law.

Mr. Sullivan: Your Honor, the average juror has no idea what the phrase "assumption of risk" means, and courts have a lot of trouble to define it. So you use that phrase and it simply misleads them.

Mr. Frates: We could say that about contributory negligence and proximate cause and everything else. I think there's some confusion about it, but I don't know when we have words of the statute, how to—

The Court: No. 4 is included in my general instructions. Do you have any objection to that one?

Mr. Sullivan: No, sir.

The Court: No. 5.

Mr. Sullivan: We have some that we are requesting in addition to this. I object to the first paragraph, but not the second, your Honor. I think this is clearly a question of an aggravation.

Mr. Frates: I will agree to deleting—withdrawing the first paragraph.

The Court: I'll note paragraph No. 1 is withdrawn. You have no objection to the second paragraph?

Mr. Sullivan: No.

Mr. Frates: I think, your Honor, it should be amended to "proximate cause, in whole or in part, of any aggravation." I think, though, that's splitting hairs.

[fol. 403] We'll just let it go.

The Court: Is this a standard—No. 6?

Mr. Frates: Yes.

The Court: Isn't that last paragraph one that you added recently, "However . . ."

Mr. Frates: That's the Braddock case, Judge.

The Court: Somebody showed it to me the other day.

Is there any objection to No. 6 or any portions of it that you want to call to my attention?

Mr. Sullivan: Yes, sir. There are certain portions of it.

The Court: All right, sir.

Mr. Sullivan: As to paragraph No. 4, I don't think there's been any evidence of shame or humiliation because of this,

your Honor. I don't think there's anything of that—simply an aggravation of what he had before. I don't think that bears on it.

Mr. Frates: I think it's something for the jury. I don't intend to argue the thing, actually, but I think it's proper in there. I think the jury has a right to determine if from the injury of this type which impairs his ability to get around, even though it's an aggravation of an existing condition—it still would be proper. But I don't stress it because I'm not going to argue it.

The Court: Any other parts of that that you specifically—[fol. 404] Mr. Sullivan: That runs throughout the charge. It's referred to two or three times.

The only other question I have about it, your Honor, is this: I think it ought to be made clear to the jury in a charge that as to—say something like future medical expenses—he can recover for some amount as is attributable to this aggravation, but he isn't entitled to recover—say, some doctor says his medical expenses will be around $250.

Mr. Frates: I agree on that.

Mr. Sullivan: He isn't entitled to $250 a year in damages.

The Court: Future medical or hospital expenses attributable to this accident.

Mr. Sullivan: Your Honor, the thought runs all the way through here. For example, it says expenses for hospital, medical care and treatment, and other expenses which he has paid or is obligated to pay in an effort to effect a cure or alleviation of any pain caused by the suffering and sickness of his injuries.

But I think that ought to be clarified to say that he hasn't a chronic condition.

The Court: Caused by his injury; doesn't that catch it?

Mr. Sullivan: No, sir. I think it tends to be misleading, unless you clarify it further and say he can recover for [fol. 405] anything he has to put out for the aggravation, but not for any amount he would have to expend, anyway.

The same would go to loss of earning capacity, in any event, his earning capacity if it would terminate—he can recover for the shortened time, if any, that this aggrava-

tion was responsible for, but not for—he'd have to step down before his life expectancy, that this thing would have caught up with him, anyway.

I think that this charge doesn't cover an aggravation situation. I think the law is basically correct, but I think it ought to be clarified somewhat.

Defendants' Requested Instructions

The Court: Let's look to the defendant's requested instructions.

Mr. Frates, let's look to No. 1. I think No. 1 is included in my general instructions, and I will note on this one that there's no question in my mind as to the law.

Mr. Frates: Judge, this is not the law in this case. Our charge, in whole or in part, is the proper charge in this case, because that's what the statute is. Just recently—

The Court: In light of your objection to this, you're not objecting to the Court's regular red book charge on preponderance of evidence, are you?

Mr. Frates: No, sir.

The Court: What portion of this is—

Mr. Frates: "... that proximately and directly resulted [fol. 406] in the injuries or damages claimed," because that's not the law.

Actually, in whole or in part—

Mr. Sullivan: Your Honor, I think every Court that's interpreted it—you don't have proximate cause. You have insurability.

Mr. Frates: That's a lengthy discussion. The Supreme Court in several recent cases, said it's not necessary and is not the proximate cause.

Mr. Sullivan: I can't agree with that. They've said it must be proximately caused, in every opinion that came—

Mr. Frates: That's not true. It can't be the proximate cause, anyway. I have a case here where they just reversed a verdict for the defendant in the Third Circuit, because the Judge charged the proximate cause of the accident, and the Court says because—that's the statute. It says that any person—resulting in whole or in part, of the negligence of the agents—

Mr. Sullivan: We said a proximate cause. That's not the law in railroad cases.

Mr. Frates: Of course, it is.

I don't see how you can argue that it's in whole or in part—

Mr. Sullivan: That goes to comparative negligence which applies under the statute.

[fol. 407] Mr. Frates: It doesn't go to comparative negligence but just as I've read you, there are plenty of cases where their negligence will contribute in part to it.

The Court: I understand your position on that, men. Let's look to No. 3.

Mr. Frates: I have the same objection to that, Judge. I think that's a charge that might be applicable if we had an automobile case, but it is not applicable here.

Mr. Sullivan: Your Honor, the statute sets up, the comparative negligence applies in this case.

Mr. Frates: You won't have one standard of negligence for the defendant and—

Mr. Sullivan: You've got to talk about proximate cause.

Mr. Frates: But you left out, ". . . was the cause in whole or in part of the injury." I don't think it's proper. I think it ought to be covered in one charge.

Mr. Sullivan: You left out in your charge, "proximate."

Mr. Frates: I think that's proper, and that's charging them in the statute which is the basis for the liability, Sec. 51.

The Court: Let's look to No. 4.

Mr. Frates: I have no objection to 4.

Mr. Sullivan: On that basis we'll withdraw 5, your Honor.

[fol. 408] Mr. Frates: Yes, I was going to object to it on the grounds it's repetitious.

The Court: I'll note No. 5 is withdrawn.

Mr. Frates: I object to 6-A on the grounds it's discussing evidence and it's gone into a negative proposition. I don't think that's correct, and I submit, your Honor, even under a notice—I submit, your Honor, this case is not a notice case.

This is a case in which they selected an area in which this man was to perform the test. And this is not some

isolated spot on their railroad where there was some debris on there and they didn't know anything about it. They selected and picked out this spot—not Smith or anybody associated with Smith.

And if they did, there's a duty on them to make sure that it is in reasonable safe condition before they put him down there on it. Therefore, I don't think the notice is appropriate.

Now, I think the evidence in this case is, other than the wire, that there was notice of the ballast and the walkways, the weeds and things of that nature. There has to be, because they've been up and down it so many times. So I don't think this is a case where this charge is a proper charge, particularly in view of the unusual circumstances in this case of them having selected an area—

[fol. 409] Mr. Sullivan: Your Honor, I think practically any time an employee does anything, his employer selects the area, to a certain extent. So I don't think that's a valid argument.

I think notice does apply in this case. If there's any objection to the phraseology of any particular charge, we'll take either of the others. We submit them in the alternative.

Mr. Frates: In answer to the fact they select any place, I think even from a practical matter, I think it's considered difficult to say, "Here's a big railroad yard where you have multiple functions," or, "Here's a railroad system where you have miles and miles of line." And to say that on that system you have to go over it with a tooth-comb and see that they have complied with the regulations—maybe from a practical viewpoint it puts a pretty heavy burden on them, although I think the Public Utilities Commission has put that burden on them and those men would work anywhere in that general area.

But here you've got a situation where they picked out a specific area of a mile to have him walk down there. Now, they selected that area, and once they selected that area they represent to Bert Smith—and certainly, if there's any question of notice having picked it out, they're on notice and have a duty to make sure that place they picked is reasonably safe, because this is not some isolated spot

[fol. 410] in the yard or some area where they didn't know anything was there.

There was a duty on them to find out if it was a safe place to have him walk down there.

Mr. Sullivan: Your Honor, if they'd send a man up to switch cars at the gas plant, it would be no different in terms of their duty toward him, using reasonable care and a safe place to walk—it would be exactly the same thing.

Mr. Frates: I disagree completely. There, they've picked out this area to conduct a test, and they can't come in and say, "Well, now, we don't know anything about the condition of this area. We've got to have notice of it."

I say, there's a duty on them to find out before they start the test, whether or not there's anything there, before they have him go over there.

The Court: Let's look to No. 6, please.

Mr. Frates: I think that's repetitious, your Honor, and I have the same objection to that as I stated, 6-A.

And in addition to that, your Honor, I think there's a continuing duty on the railroad under the Utility Commission regulation which is in evidence, to keep this area clean. And then we go back again, your Honor, to another matter of the rocks and the ballast and the walkway there, I mean in the area where they were walking—and the bushes and weeds.

[fol. 411] Those had to be there and they had to have notice. Now, as far as the ballast is concerned, when you have notice, when you have placed something there, then you don't have to have notice of it. You have constructive notice.

It's only those things, I think, that notice might be applicable in another case—not in this one, as far as the wire is concerned. And I think Dwight will argue that they did not know the wire was there, or that the wire wasn't there.

But I don't think that it's the law that they have to be placed—that they have to have notice of that wire being there, since they picked this place out.

But as far as the rocks and other things, there's no

question in my mind that there is no notice required on those, because they put them there.

Mr. Sullivan: Your Honor, I will concede that as to ballast—that unless it's something that happened overnight, Mr. Frates is right.

But their case, I think, hangs to a large extent, on this wire. I don't think you can say, "There's a piece of wire there. You're liable because it's there." If it were a chronic condition all the time, that might be one thing.

There's no evidence of that in this case. There's some conflicting evidence about the nature of wire, and I think notice does apply to it. I'll be glad to limit notice to the [fol. 412] wire, and not to grass or the condition of the right of way, other than that.

Mr. Frates: I think, again, we come right back in the average case. I would go along with him on that, particularly, if it wasn't shown that it was something that came from the operation of the railroad.

But in this particular case, I go right back to the proposition that this is the area that they selected, and there is a positive duty on them to see that it's free of debris and that they can't walk down there and say, "Oh, Oh; here's something that you tripped over, and it's too bad we didn't have notice of it."

I don't concede that to be the law in this particular case.

Mr. Sullivan: Your Honor, if someone threw some wire on there that morning, I don't think anybody would hold the railroad responsible for that. I don't think it's a positive duty to discover it. I think Mr. Frates is putting on the defendant the duty of an insurer practically—

Mr. Frates: No, I'm saying that when they select this place to run the test, they must use ordinary care to see that this is a reasonably safe place to have him walk, and a reasonably safe place would be a place free of wire and the ballast and the weeds and things in accordance with that.

And I want to request a charge on the Utility Commis- [fol. 413] sion regulation. There is a positive duty on them to do it, and I'll grant you that under normal circumstances if someone slipped in there and threw a piece of wire that had no connection with the railroad in any way, during

the night, and the next morning someone tripped over it, that we would have a question of notice.

But I say that that's not applicable in this case.

The Court: Let's look to No. 6-C now. It's another one on the notice question, isn't it?

Mr. Sullivan: Yes, your Honor. We submit it's in the alternative.

The Court: I understand.

Mr. Frates: I object, your Honor.

The Court: I'll note you object to all those on notice. No. 7?

Mr. Sullivan: Your Honor, I'll withdraw that.

The Court: No. 8? Any objection to No. 8?

Mr. Frates: Judge, I don't think that's taken out and put in a specific charge. I don't think that's the law in a railroad case. I think that's a statement that should be incorporated in a comparative negligence charge, because I think it gives an entirely distorted picture because what you're saying is, "Take reasonable care for his own safety," and if he doesn't do that, it's the sole proximate cause. [fol. 414] The jury is not familiar with these things, and I think it's misleading and ought to be included in comparative negligence, because again, we go right into the assumption of risk and it should be taken in its total context instead of being highlighted, which I think it is.

Mr. Sullivan: Your Honor, like anything else, you say it ought to be included in some other charge. You can't put everything in one charge.

We've got one on comparative negligence. We've got one on the part of the duty of care on the part of the defendant. I think the duty of care on the part of the plaintiff applies just as well.

The Court: Let's look to No. 9.

Mr. Frates: I don't think that's the law, and I think that consequences follows that.

Then again, your Honor, this is what I call one of these negative charges. Your Honor is going to charge them on the responsibility of the plaintiff in establishing their case, and the respective duties and responsibilities, and what we have to do is prove the injuries and the aggravation.

This comes along and is one of these negative things. We could have—probably both sides could have several hundred charges about what things aren't in this case, but I don't think that's a way to submit a case to the jury because I don't think it does anything other than confuse the issue.

[fol. 415] And the basic issues are going to be submitted to them and will be submitted under proper charges.

The Court: Mr. Sullivan?

Mr. Sullivan: We took it from that case, your Honor. I don't think there's anything wrong with the basic law on it.

Mr. Frates: I'm not at all sure that it's liable for injuries. If it was a wrong and—then I think they're liable for them.

I don't think "possible" is right. If you performed a wrongful act and there was a possibility—I don't think this "possible" and "probable" is the law as far as that's concerned.

The Court: Let's look to No. 10.

Mr. Frates: No. 10 I object to strenuously. I don't think it has anything to do with it.

Mr. Sullivan: Your Honor, half of the plaintiff's case has been, "You have no right to make any tests at all. You couldn't do anything about it." Certainly, the law is as to fellow-employees as to passengers on the train—you have a duty to retain competent people in your employ.

If, for example, there had been some sort of accident and Bert Smith had been involved, there are cases day after day where they turn around and sue the railroad, saying, "This man was not up to par. He was not an up-to-snuff employee and you can be held liable for it."

[fol. 416] To comply with your duty of having reasonable competent men, certainly you can test them or check their qualifications. And it gets back to reasonable care again, your Honor, but I think that's highly important in this case.

Mr. Frates: I think one of your premises is wrong in saying you don't have the right to test them. No one has contended the railroad doesn't have a right to have competent personnel.

We're saying this is a jackleg test that they devised solely for Bert Smith, and who are competent to do the work required, likewise, to exercise reasonable care—I think if any part of this charge is to be given, is that the railroad has a duty to see that its employees are able to perform their duties with reasonable care.

Not only that; you're talking about knowledge or notice of their incompetency. I think this is getting right on the line of discussing the evidence in the case.

Then there's actually no knowledge or notice of incompetency in this case.

Mr. Sullivan: Your Honor, then in the second sentence I'd be willing to delete after the words, "competent," to the end of the sentence.

Other than that, I think it's a proper charge.

Mr. Frates: This is what I call an argument charge, Judge, ". . . and not to retain." In other words, you say [fol. 417] you have a duty and not to retain—

Mr. Sullivan: Certainly, in talking about what your duty is as to Bert Smith, or whether or not they had a right to give him the test, which I don't think is properly in this case, anyway—certainly, I think it's germane and should be brought to the jury's attention, the other duties.

Mr. Frates: And I don't think that this is right: "In order to fulfill this duty an employer may take such measures as are reasonably necessary to determine the ability of employees to do the work required."

I think the charge is so wrong that I—

The Court: What's the purpose of that last line, Mr. Frates? I thought we said—

Mr. Frates: Has the duty—I think the employer has a right. I don't think to furnish an employee with co-employees who are competent to do the work required . . ." I don't think those are the facts in this case. I think the railroad has a duty to exercise reasonable care to see that its employees are competent, or able to do the work that they're required to do.

Now, to come along and say they can give them tests and things of that nature, again, is commenting on the evidence. It goes beyond that.

Now, that's a duty on them, but if you go along, your Honor, and say, "All right,"—what you're telling the jury [fol. 418] is, "It's all right for them to give tests," but that's for the jury to determine, taking into mind there is a duty on the employer—and I will agree, there's a duty on them to have competent men. But how they determine that competency, I don't think is for the Court to say that they can give them tests and things of that nature.

Mr. Sullivan: Your Honor, I think the question might be, was this test unreasonable? But I think you can certainly say that part of the duty is to test your employees from time to time.

The idea of reasonableness, of course, is what runs throughout all of these cases. But to say it's up to the jury to determine whether you can test them or not, I don't think that's true.

I think that's a matter of law. The question is, whether or not the test is reasonable.

Mr. Frates: I don't think so. I think it's a question of what reasonable precautions they take, taking your case where they had sued somebody for an incompetency—they were contending that one of the employees was incompetent. Certainly, Mr. Sullivan would be the first one to holler if we came in to say, "Now, did you test him to see if he could walk a mile or two?"

He'd say, "There's no duty on us to do that." I think that gives some judicial undertanding to a test.

[fol. 419] Now, Mr. Sullivan can argue that in the exercise of their duty to furnish competent employees, that it's all right to give tests and to do things. But as to how they arrive at that and how they do that, that's for the jury to determine.

The Court: Let's look to No. 11. Do you want it, ". . . contributed in whole or in part . . ."?

Mr. Frates: Sir, that to me, is encroaching on the jury's prerogative. You tell them, "Here's the case. You go in and decide it." And you tell them, "Don't you talk about the damages until you talk about the liability."

I don't think this is a proper charge. I think if they want to discuss the damages first, and then come around to the liability, that's their privilege. I think in the or-

dinary process they should, but I don't think it's the law that the Judge tells the jury how they decide the case, when they get back in the jury room.

The Court: Mr. Sullivan?

Mr. Sullivan: Your Honor, it came out of that other case. I think it's proper law. You can say, "Here are the questions for you to determine." Even in spelling out—

Mr. Frates: I think in the normal course of events they're going to determine whether there's liability before they go into the damages, but I don't think you can tell the jury, "You should first consider . . ." and so forth. That's [fol. 420] a positive-negative charge, in that you're telling them, "Don't even mention it," and I think you tell them first, "You've got to hear the issues. You determine the liability," and you do that in the damage charge.

"If you find that they're liable, then you then assess damages."

The Court: Let's look to No. 12.

Mr. Frates: You say, ". . . It must appear that the plaintiff will suffer such damages as you assess with reasonable certainty." It's all right. I have no objection to it.

The Court: The next one, No. 13.

Mr. Frates: I don't think the sympathy—I think it's the old negative proposition, that you're not to let this interfere in that, either. If you go on and say, "The fact that it's a railroad"—but I don't strenuously object to it.

The Court: No. 14.

Mr. Frates: That's just a paragraph taken out of the Wilson case, which is the view of the Court. But like so many statements of the law that are good law and are proper in a decision, I don't think they're proper for a charge to a group of laymen.

Mr. Sullivan: Your Honor, I put this in in anticipation of the usual plaintiff's charge. If they're not requesting any, I'll withdraw this one.

[fol. 421] Mr. Frates: On what?

Mr. Sullivan: On pain and suffering. Plaintiff's charge is, in effect, "The sky is the limit, boys. Charge."

Mr. Frates: We've pain and suffering in our general charge.

The Court: But you haven't any description of what it is.
Mr. Frates: No.
The Court: Let's look to 15-A.
Mr. Frates: It's all right.
15-B is the same thing.
Mr. Sullivan: We don't care—
Mr. Frates: It's all right—either one of them. I don't think there's any issue of contributory negligence in this case, though. You're not contending the wire was there. Are you contending he should have seen it if it was there?
Mr. Sullivan: Not only that. I think there's plenty evidence to this fall up the line, that he fell for no reason at all. If he fell, he fell because he stumbled; because he was tired.
The Court: Let's look to 16-A.
Mr. Frates: Judge, I think that's covered in ours, and I don't think we ought to have on any point—even though this is generally to our favor, I don't think we ought to have two charges on any one particular point.
[fol. 422] Mr. Sullivan: Your Honor, I feel that Mr. Frates' charge is correct as far as it goes, but I don't think it spells it out completely.
Mr. Frates: It's limited to the amount of damages caused by any pre-existing condition. To me, that's covered as clear as you can get it.
Mr. Sullivan: What's left out of that is that there's certain evidence in this case that this thing was progressing, so I don't think you can take a before and after—you should put an allowance in here—
Mr. Frates: I don't have too much objection to it.
The Court: No. 16.
Mr. Frates: 16-B, Judge, I think is repetitious, or more in detail of what we said in 16-A.
Mr. Sullivan: Again, your Honor, I'm just requesting one of the three.
Mr. Frates: All right; 16-C, about the same.
17, I have no objection to.
Mr. Sullivan: I think 18 is already covered.
Mr. Frates: 18 is already covered.

COURT'S RULINGS AND EXCEPTIONS THERETO

The Court: Will you note, Miss Reporter, that looking to the Plaintiff's instructions, that the Court will grant No. 1 and grant No. 2. I denied No. 3. I denied No. 4 as generally included in my own instructions; it's included word for word.

[fol. 423] No. 5 is the second paragraph only. I granted No. 6 as amended by the Court, and I will advise you, for the purposes of your argument, but I will delete paragraph 4 of the damages, sub-paragraph 4.

Looking to the Defendant's requested instructions, No. 1 is denied as being generally included. No. 2 is denied. No. 3 is denied. No. 4 is granted. No. 5 is withdrawn.

No. 6-A is granted. 6-B and 6-C are denied as generally included.

No. 7 is withdrawn. No. 8 is granted. No. 9 is denied. No. 10 is given as amended by the Court. No. 11 is denied, No. 12 is granted.

No. 13 is granted. No. 14 was withdrawn. No. 15-A was granted. No. 15-B is withdrawn. No. 16-A is granted. No. 16-B and 16-C were withdrawn.

No. 17 is granted, and No. 18 is withdrawn.

Mr. Sullivan: Your Honor, I assume we both want to note exceptions.

Mr. Frates: Yes.

Mr. Sullivan: Except to the ones that we requested in the alternative.

(Thereupon the parties present at the charge conference returned to the courtroom. The jury returned to the courtroom, and the following proceedings were had:)

[fol. 424] Thereupon—

C. A. BRINEGAR was called as a witness in behalf of the Defendant, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sullivan:

Q. What is your name, sir?
A. C. A. Brinegar.
Q. Where do you live, Mr. Brinegar?
A. 141 East 52nd Place in Hialeah.
Q. Who do you work for, sir?
A. Florida East Coast.
Q. What's your job with the railroad?
A. Conductor.
Q. Were you working as a conductor in September of last year, Mr. Brinegar?
A. No, sir; I wasn't.
Q. Were you working for the railroad at all?
A. Yes.
Q. In what capacity, sir?
A. Trainman.
Q. Can you work as a conductor when your seniority entitles you to?
A. That's right.
Q. Mr. Brinegar, can you state whether or not you also [fol. 425] have a business of selling insurance policies to fellow-employees?
A. Yes, sir.
Q. Were you in the same business last year, in September of last year?
A. Oh, yes.
Q. Mr. Brinegar, did you and Bert Smith have any conversation about his purchasing an insurance policy from you?
A. No, sir.
Q. Did you at any time last August or last September recommend to Bert Smith that he go to the hospital in St. Augustine to be examined by Dr. Lockwood?

A. No, sir.

Mr. Sullivan: No further questions.
Mr. Frates: No questions.

(Witness excused.)

The Court: We'll excuse the jury just a moment, again, please.

(Thereupon the jury retired from the courtroom and the following proceedings were had:)

Mr. Sullivan: Your Honor, prior rulings and motions will be considered as having been made now.

The Court: We'll note that. And also, I'd like to renew the charge conference at the completion of the testimony which we've just recently completed, and also there's been [fol. 426] one additional instruction submitted to the Court by counsel for the plaintiff, requested instruction No. 7.

Mr. Sullivan: We have no objection to it, your Honor.

The Court: I will note there is no objection to it, and I will grant No. 7.

Anything further gentlemen, before we bring the jury back in for our closing arguments? Mr. Frates?

Mr. Frates: No, sir, your Honor.

Mr. Sullivan: No, your Honor.

The Court: Bring the jury in, please.

(Thereupon the jury returned to the courtroom, and the following proceedings were had:)

Closing Argument of Plaintiff's Counsel

Mr. Frates: If the Court please; gentlemen: We finally got to the end of this case, at least as far as the attorneys are concerned. We're going to take a few minutes, both sides—we have the right to discuss with you in a summation the evidence and the law that's applicable.

And as I said when we first started, of course, what I say and what Mr. Sullivan says is just an assistance to you in trying to arrive at the real facts in this case, and whether under the law, the plaintiff is entitled to a verdict.

Of course, we appreciate—I think everybody appreciates the fact that you folks have been as attentive as you have, and I know that it's an imposition on some of you. In fact, [fol. 427] everybody, to be here Saturday. But I can't let it go by without pointing out to you—and I'm sure that a lot of you are aware of—that what you're doing now is probably a more important function than any other citizen has. And lots of people have lost their lives, and lots of wars have been fought so you people can sit there and determine issues between citizens which, of course, includes railroads and corporations.

And this is a courthouse that belongs—and the law that belongs to you folks, and to the Bert Smiths and to the railroads—not to the judges and not to the lawyers. We're just here to make it work, or to help you in determining what the issues are in this case.

And that's why, in a case like this, when I first heard the facts of it I felt that this was a case where somebody had been wronged, and the law in this country is that when somebody does something wrong or careless—and this is not a criminal case—and somebody gets hurt as a result of that, t[illegible] our system of law the person who causes an injury should pay the person who they hurt in monied damages.

That's what we're here for, to determine whether or not the railroad is liable and whether or not Bert Smith is entitled to damages in money. Now, the judge will charge you as to the law that's applicable in this case, and as I told you earlier, and in my opening statement—and as I told you then—I think that everything that I told you in that [fol. 428] opening statement we have established without one doubt.

I went over my notes and I think that everything that I told you that we would bring out was brought out from the witnesses who took this witness chair.

Now, the judge is going to tell you that the railroad is responsible for any act of any person who works for the railroad, which in whole or in part caused injury to Bert Smith. Now, those words, "in whole or in part" are special words in a statute that applies particularly to railroad men, that if this railroad did anything wrong—and that's

all—we'll use some words of negligence and preponderance of evidence and things of that nature. But what we're trying to determine in this courtroom is the relative rights between Smith and the railroad under the law. And if they have done something wrong, then they're responsible for all the consequences of their wrong.

If what they did was wrong and entirely caused this condition, or just partly was responsible for his condition, then under the law Smith is entitled to a verdict.

Now, let's talk about Bert Smith for just a few minutes. Bert Smith is, as I told you earlier, a legend on the railroad. Bert Smith is what I think some of us might call a character. That's what I call him. But Bert Smith, just like anybody else that comes in this courtroom, has a right to have his case decided under the law, and just as the rail- [fol. 429] road has a right to have their case decided under the law.

This courtroom is for the weak and the strong and everybody else. That's where we hope that everybody can get equal justice.

Now, Bert Smith worked for this railroad from 1920 as a flagman. And you've heard the evidence. He has been —and as I told you, they don't call him, "Slim"—and he's no sprinter, and he's always been that way.

But, gentlemen, here's something to me that is of paramount importance in this case. Since 1920 Bert Smith has been a flagman on the Florida East Coast, running up and down this line, and he has never received a demerit for failure to do his job as a flagman. Not one demerit in some 37 years!

And you heard me when I asked Mr. Johnson, "You men go up and down the line; you conduct what they call these efficiency tests. You can demerit a man. You can fire a man if he doesn't do his job."

Now, gentlemen, is it pretty good evidence that in 37 years a man was doing a pretty good job when he didn't have one demerit? And is it pretty good evidence that he didn't violate this rule book or these rules by which the railroad is run, because if he had he would have had those demerits. Now, to me, that's the test of the fact that he was doing the job as they wanted him to do it.

And they come in here, gentlemen, under the guise of [fol. 430] safety and say, "We're going to run a test on Bert Smith without the medical department or anybody else," the first time in the history of the railroad, and they come in here and say, "This is a safety factor."

Well, gentlemen, I want to show you another thing that I thought was of particular interest. This letter is in evidence. This is the letter that Clark wrote, and I don't quarrel with the railroad about safety, gentlemen. They want to run their railroads safely. Everybody that rides on the railroad, including the crews and the passengers, wants to see it safe.

And I'll have no quarrel with them about seeing that the men that work on their railroad can do the job as they want it done. But Bert Smith was doing the job. And if he hadn't been doing the job, he would have had demerits and would have been fired.

As I told you when we started, this was a Bert Smith test. This is a "get-rid-of-Bert-Smith"—and here, to me, is pretty good evidence of it. They mention another fellow, B. A. Collins, in here.

Now, gentlemen, there was never any other test given to anybody on this railroad like the one they gave Bert Smith. Now, let's talk about their safety, and they're going to come in here and they bring Mr. Clark in here, and they talk about block system and they go back to the block—that's [fol. 431] not in the rule book. That's not in these regulations issued each year.

There's nothing in there about that. They're stuck. They knew they were wrong when they took that man out there without a doctor, and I don't object too much, gentlemen, if they want to make some tests. But they took this fellow out there, that had been in the hospital, and took him out here on a hot day and they didn't care whether the fellow lived or died. And it was just by the grace of God that he didn't kill himself out there.

Smith could have killed himself out there that day, and why they did that, I don't know. Gentlemen, it was wrong for them to do the test that way. And doing the test that way resulted in his injury to him. And, of course, he had osteoarthritis before.

Even if they were going to make a test, let's concede they could have made the test. They should have done it the right way, as the way Lockwood said. "Yes, I've participated in this test." The medical department could work with them.

Now, they might have killed that man. They didn't, but they hurt him. Now, what if they had taken that man out there and he died? Would they be responsible for that? I say they would, gentlemen, because that wasn't any regulation test. There wasn't any regulation distance or anything else.

[fol. 432] And the least they could have done was to have a doctor along to make sure that everything went all right, or to have a doctor approve of that test. Now, they didn't kill him, but they hurt his knee. If they'd been wrong in killing him—and would there be any question about it—then they would be wrong in hurting his knee.

Why—if this is a real test—why is it, all of a sudden they pick it for one guy? This railroad has been in existence, I think, since 1896. And since that time there has been one man. They don't give that test any more to anybody, and they never will give it to anybody else because they know that's not a fair test.

Now, I have to laugh a little bit about their idea of safety, and you're going to hear Mr. Sullivan say, "We don't want to have the trains run together." Well, gentlemen, let me ask you one thing—and I want to ask Mr. Sullivan to answer this: If they talk about safety, what about this block system that they leave lights out for two and three days? To me, that's shocking.

Here's a modern device, a safety device, and they say, "Oh, sometimes we leave out lights for two or three days." They're really interested in safety.

What they're trying to do is to camouflage this case. They know they're wrong. They know they did something they shouldn't have done, and they're trying to pull a [fol. 433] blanket of safety over it.

If Smith couldn't do his job, why did they let him run on the train? They had the right to take him off of that any time they wanted to, without any test—any test at all. As you've heard every one of them say, "If we thought he

couldn't do the job, all we'd have to say is, 'Bert Smith, you don't run on that road.'"

Then later they would have probably got into a dispute as to whether or not he was qualified to work, and then they could have done that. But if he wasn't able to do the job, they could have taken him off. But they didn't do that.

You know, I don't understand for, let's say five or six years Bert Smith has been in about the same physical condition as far as walking. He's totally disabled now as far as working. There's no question—there's no contradiction as far as the doctors are concerned.

But he was in the same physical shape, and these men were making these so-called efficiency tests all the time, as they say, which involved the flagmen, and he never got a demerit for it. And he was of the same general build and type—and you heard Baumberger say that.

So there's no question of that. He's never been a fellow who could fly down that track, but he was doing the job for them. And if they were interested in the safety, and if he [fol. 434] wasn't able to do the work, they could have taken any time in that five years to take him off.

You heard all of them say they live and they operate the railroad by the rules. Mr. Clark wants to come in here and change the rules. You don't hear anybody else coming in here and saying anything about going back to the block system. Here's the rule book; there are their rules, and Bert Smith never violated one of them.

If he had, he would have been gone a long time ago. And they knew it, and that's why they wanted to get rid of him. This has been a personal proposition between the railroad and Bert Smith. They wanted to get rid of him, and they figured among themselves, without the doctors, "Boy, this is the way we'll give it to him."

And I'll say in fairness to Clark, I don't think Clark realized the implications of when they took Smith out there, what could have happened to him. And if you heard the fellows testify that he was white; his lips were red; he looked like he had a heart attack—and they were pretty worried about it. They wanted to get an ambulance and get him to the doctor's.

I want to talk a little bit about the block system. You know, I was surprised that the railroad didn't bring in somebody who knows how this works. We finally got around to stipulating.

[fol. 435] Now, here's a block system, and they're making a big to-do about coming back. But let's say these are the signal posts; that you come back if you're stopped in here, to see what color this light is, and that you have to walk a mile.

Now, gentlemen, I submit to you that there are no occasions when you have to walk a mile on this railroad. And I want to talk about that a little bit, for a safety factor. They'd have you believe for a while that their lights went out all the time. I've never heard such an argument in my life.

"Well, our block system is no good. The lights go out all the time." To me, that's amazing. And they bring a bunch of things in here and say, "You don't have to stop. You can continue past this one." These are the people who are talking about safety. They say, "You have to come back and look at this one."

Now, gentlemen, Mr. Clark would have you believe that that light went out, and then all the rest of them—where, when we finally got him on cross examination, he said, "I'm not sure how it works." And then we finally got them to stipulate that when there's any defect in this one, a mile away, if this is supposed to be red if a train is stopped here, this turns red; this turns red and this turns yellow.

[fol. 436] And we've got this distance, whatever it might be, we have a mile in here. And a train coming down here that can see that light for a considerable distance—when it sees that yellow it slows down and gets ready to stop.

Now, why would a flagman have to come all the way down here? Now, when this system doesn't work, gentlemen, these lights go on to stop, or slow down. So it's not a question, you go down there and see whether it's green or red.

If anything goes wrong with this system—and that's why they have it that way—so if a train is approaching here, you're stopped here; a train is approaching here. Let's say this red light is out. First, let's say it's on. This will flash red. This will go yellow. A train comes down here. Say,

it's right on it. It goes a mile. It slows its speed down. It sees this red. It stops.

All right. Let's say, as they say, "Well, a lot of times these lights are out." The light's out; this is yellow. The train comes in here and getting ready to stop here, why would the flagman go down here—have to walk back a mile?

Now, that system is so devised that there can't be anything that would stop that train unless the engineer just didn't look at it—stop that train from getting a signal to slow down or stop, at least, a mile before they ever get to the other block.

[fol. 437] Now, what's he going to do? Walk down here and wave at him? Now, let's talk about the practical thing. The only reason they have these fellows go to protect the rear of the train—sure—is to prevent a collision.

Let's take a straight track. Here's a train. Let's take the daytime. Here's a train standing here, and let's forget about the block system. Let's just put it over here. The block system is foolproof, as far as stopping the train, even if the lights go out.

Let's take the block system out. All right. Here's a train stopped here. Let's say this is straight track. A man can see that train on a straight track. You look at some of these pictures that they have introduced in evidence here, and you heard Bader say today—and you've heard these other people say—that you can see a man three-quarters of a mile down the track.

Now, we're talking about, can this train stop and let's take the maximum speed that a train can go on that line, 79 miles an hour. They say if it comes to a gradual stop it takes them about a mile if they're coming in here to stop at a station.

I thought it was very strange that no one came in here and told you how quick they could stop in an emergency. We finally got one of the fellows to admit, "Well, it's somewhere around a half mile."

[fol. 438] Now, that's the fastest train at the greatest speed. They can stop in a half of a mile. So in the daytime they could see the train. At nighttime—and we're on straight track—at nighttime they could see the lights if you didn't even have a flagman there.

If the man comes down there and walks down here a quarter of a mile and flags, he would stop the train. You could go back here a quarter of a mile. You could come on back—and the train coming could see you from three-quarters of a mile.

So you've got a mile there. And that's why Bert Smith hasn't had any demerits, gentlemen, because Bert Smith was flagging and doing his job without going back here a mile. He said a couple of times he went back a mile, and he said one time, "I went back because the fellow was blowing and I went back until he stopped blowing." He's just the kind of fellow that would. I think if they would have left him alone, he probably would have gone back to Miami. But that's Bert Smith.

Now, you come to a curve. You talk about curves. They didn't show you a picture of any curve or tell you any degrees of any curves, did they? Well, at all times, gentlemen, on this track, from here to Ft. Pierce, the engineer, I'm sure, can see on a curve. Here's these curves they talk about. Look at this curve here. This is one of the [fol. 439] curves. Of course, the railroad's got curves. Why, you could see on that curve a half mile ahead, in time to stop.

You come up to a crossing, gentlemen, an unobstructed crossing in your automobile, and get hit and come in here, and see how quick they'll say you should have seen that train down there about a mile away coming. They'll tell you that quick enough. They'll say, "Well, all you had to do was look."

Well, I put the same principle right on them now. You take nighttime; you can see one of those flares. There's been different estimations. I'm sure that you could see a flare at least a mile away with that particular color that it has, in the nighttime.

They have the lights on the thing. And still, the flagman should come back and flag and wave his flag. But I say, gentlemen, that this idea of them having come back a mile doesn't make sense. And it goes back to this proof—and I don't know how you can ever get more proof than what actually happened.

The man was doing his job and he was doing it to their satisfaction, in about the same physical condition that he had been in for about five years. Now, what better proof is there than that? Okay, so they come around to the test they're going to give him.

Now, where do they take him? They take him out here [fol. 440] to an area—I didn't introduce Mr. Delk's deposition, because frankly, I was waiting for Mr. Sullivan to do it—because when he does that, he vouches for his witness. He reads this deposition to you and says, "Gentlemen, here's a man that I am putting on—his testimony. I'm vouching for him." And then he reads you parts of this deposition, and if he had stopped and if I hadn't said anything, he would have you believe, reading—skipping paragraphs, that there wasn't any wire; that this was just a fall and that there was nothing unusual about it.

And then I got up and read the parts that he had skipped over. Now, he wants you to believe this witness. I want you to believe this witness. And this witness says, "There was rock; there was the wire there." And Mr. Sullivan just hopped right over the wire.

They don't want to say anything about the wire. They don't want to say anything about the weeds. But I say to you that their witness is good enough for me, and he said, "That's the worst place. They couldn't have picked a worse place to run this test than where they had run it." The first time in the history of the railroad, and the worst place that they could have run it.

I think, gentlemen, they went out there intentionally knowing, or hoping that Bert Smith could not pass this test. [fol. 441] Now, we've got rules and regulations, and one of the questions that you have to determine is whether or not they violated one of these rules and regulations of the Public Utility Commission of the State of Florida.

And there's no contradiction in this case that they did. We've introduced this Rule 6, "The space between such tracks as are ordinarily used by train and yardmen . . ." That's Smith— ". . . and other employees in the discharge of their duties, and the space between such tracks within eight (8) feet of the center line thereof shall be kept clear of grass, weeds, mud, slime, debris and similar obstacles."

When I asked one of those railroad men, "Was there grass there?" "Yes." All right; a violation of this regulation.

Now, this is for the protection of the men, and if you believe they violated this—and that contributed in whole or part to the accident or his fall, then he's entitled to a verdict. Gentlemen, this case should be decided on the evidence, and here's the document. There was the testimony that there was grass; there were weeds; there was debris, and similar obstacles; there were sticks—all of those things. And this places a positive duty on them not to have them there.

Now, in the practical matter in the operation of a railroad, you can't have somebody's living room floor—I will concede that—but they went out there. They picked this [fol. 442] place. They had a duty, and the judge will charge you, to see that that place was reasonably safe, and not the worst place on the railroad.

Now, I want to talk to you a little bit about the damages in this case. There's no contradiction in the medical testimony. There were only two doctors who testified, Dr. Morgan on the railroad staff—and that's one reason we brought him in. We felt he was a competent doctor, and that he was also a member of the railroad staff and would try to be fair and impartial to everybody, as I'm sure he was and I'm sure the railroad thinks he was.

And there was really no conflict between Dr. Morgan and Dr. Holmes. What did Dr. Morgan say? He had this condition; Smith had it. But this fall or these falls caused him to lose three to four years of his earning capacity.

Now, the judge will charge you that in a case of this type where you have something wrong with you and as a result of an injury it's aggravated, then they are responsible for that portion of the condition caused by them.

All right. So we have a definite measurement. We know he's totally disabled—a definite measurement of three to four years by the railroad's doctor. At $500 a month that's $6000 a year that a flagman would make.

Sure; a flagman is one of the best jobs on the railroad. That's $6000, and if you take three years that he's lost,

[fol. 443] that's $18,000. And there's no conflict that he can't work now, that he's totally disabled and there's also no conflict, gentlemen, that eventually he would have gotten that way.

But what we're talking about is what they caused him to lose, and that's all we want. That's all Bert Smith wants. So you call it three years, 18,000. You call it four years; it's 24,000. We think we don't make much because it goes faster than we make it, and groceries and everything else cost a lot of money. But when you start adding up what you make each year and multiply it by four or five years or ten years, it always is a shock to find out that actually that much money is involved.

So let's just say $20,000. Let's take in between. By doing this thing, gentlemen--by taking him out there, they caused this fellow to lose $20,000 worth of income that he normally would have gotten.

Now, certainly, he's entitled to that. The judge is going to charge you that there are other elements such as pain and suffering; personal inconvenience; inability to do a lot of things that we like to do. And as we get older, we appreciate doing a lot of the little things a lot more than we do, I think, when we're younger.

And when you get to his age, you realize you're not going to be here forever, and you like to do a lot of little things [fol. 444] that cause you to enjoy life, and not have to work all the time.

The judge is going to tell you that you can take all of those, and should take those into consideration and put an evaluation on them. Now, gentlemen, I don't know what this case is worth. I'm not going to suggest a figure to you. I know that to me, the pain and suffering, the personal inconvenience and these other things that his Honor will read you, are your law in this case, and that you should consider, are just as valuable. To me, they're more valuable than the loss of earnings.

But you are to determine the amount that Smith is entitled to. And, gentlemen, they did something wrong. They did the wrong, the way they performed it. Even if they had a right to do it, they should have gotten a doctor and checked on that basis.

They caused this fellow to be in the shape he is now. They caused him to lose this money. And the law says, when you do a wrong and somebody gets hurt, you've got to pay for it.

Now, I think you could stand up here and say that this was a dirty, rotten trick they pulled on this guy because that's my personal opinion. They were out to get him, and they did. They got him good; they got him so he won't work any more for them, and the law says—not [fol. 445] my law—not the judge's law, but your law—says that under those circumstances they should pick up the check.

And, gentlemen, I think that's what they should do under the evidence in this case.

Thank you.

(Closing Argument of Defendant's Counsel)

Mr. Sullivan: Your Honor; gentlemen: In discussing this case Mr. Frates ended up and talked about the injuries to Bert Smith. He let off discussing a good many things which I'll get to in a minute.

I'm going to reverse my argument. He gets to come back to you on what's called a rebuttal argument. I get to talk to you one time only in summing up to you today.

Mr. Frates ended up with doctors and injuries to Bert Smith. I said on my opening statement that I thought the evidence would show that what Bert Smith had before, he has now; that there is no denial that if he fell, his bad left knee was injured, and the injury to it was aggravated.

But what he has is something that's progressing. It goes on. It gets worse. As Dr. Holmes said, once it starts, the faster it gets worse, the faster it accelerates. And what Bert Smith has today is essentially what he would have had, anyway, and I think all of the medical testimony bears that out.

Now, I'd like to start with some of the doctors who [fol. 446] saw him. And I think the one that really gets me is this question about Dr. Lockwood. Mr. Frates brought Dr. Lockwood down from St. Augustine—brought him down here and held him out as being the chief sur-

geon of the railroad; also the chief surgeon of the East Coast Hospital Association.

Dr. Lockwood said that Bert Smith had seen him on September the 10th, 1956. He went up to him and said, "Doctor, I want a checkup for a insurance examination." He said nothing to him about a field test whatsoever, although Bert Smith admits that there had been a conversation between Mr. Clark and him before that time.

You heard Bert Smith say that the reason he went up wasn't because of this field test. And I asked him that question. He said it was because of Mr. Brinegar. Well, that just isn't so, either. What happened—and some of these letters in evidence bear it out—is that as soon as there was a conversation between Mr. Clark and Bert Smith, Bert Smith went to Mr. Baumberger and Mr. Delk and they said, "Go on up and see Dr. Lockwood, but don't tell him what it's all about. Tell him this is an insurance examination and tell them what sort of a report you can get."

Now, here's a letter signed by Mr. R. S. Delk, and Mr. P. J. Baumberger. You remember, on the 13th they presented Mr. Clark with a letter and said in effect, "Mr. Smith is in good shape. He's capable of doing the work."

[fol. 447] One day later they wrote another letter, and here it is. I ask you to read it when you go back there. It says, "Trainmaster Clark, just prior to September 8, talked to Trainman Smith regarding the possibility of him taking Railroad Retirement, and the possibility of a field test." This prompted Smith to report to the chief surgeon September 10th for the so-called field test which had not been ordered by the chief surgeon or any other staff doctor.

It's quite clear that he went up and told the doctor one thing. He was going up there for another thing, they admitted here. The day before they tell Mr. Clark, "Mr. Smith is in good shape. He's capable of performing duties of a trainman." The day after, the same two men writing another letter, say, "There can be no question about him being in a weakened condition." That's about the deal that runs all the way through this case.

Now, as to the doctors that Mr. Smith saw, he went to Dr. Nash. He says that Dr. Nash treated him and sent him to Dr. Manson. We read Dr. Manson's deposition to you. Dr. Midkiff treated him. The plaintiff brought in none of these people. Who did he bring in? He brought in Dr. Morgan who hadn't seen him until May of this year, and he says Dr. Morgan is a railroad doctor.

Well, I think the evidence shows—I went into this on part on opening statement, that that isn't so, either. There [fol. 448] are a number of doctors down here that the railroad employees can go to—any of them he wants. And Bert Smith has shifted from doctor to doctor to doctor.

He went to Dr. Morgan for whom I think both Mr. Frates and I have the highest regard, but I say he didn't shoot straight with him. Dr. Morgan hadn't seen him for three years.

Mr. Smith says, "Well, I've had this arthritis." Now, I asked him specifically, I said, "Did Mr. Smith tell you that his left knee had been bothering him, specifically, that his left knee had worsened a lot more than his right?" Dr. Morgan said, "No, sir. Well, he mentioned something vague about arthritis and I just assumed it was the same in both knees."

So in evaluating Dr. Morgan's testimony, if the patient doesn't shoot straight to him, I don't think a doctor can give you an honest answer about the patient's condition. Now, that's just happened here. Mr. Bert Smith, when he saw Dr. Morgan two or three months ago for the first time, didn't tell him all the facts. And the doctor who hadn't seen him, himself, for some three years, was not in a position to evaluate the worsening, if any, of Bert Smith's left knee because Bert Smith never mentioned it to him. And that's the long and short of it.

Dr. Lockwood said when Bert Smith saw him on Sep- [fol. 449] tember the 10th, he said, "I feel fine, Doctor. I feel wonderful." Like any doctor, he depends a lot on what a patient tells him, on whether or not he's going to let him go back to work.

He said he saw him in January. He said he thought at that time he was essentially the way he'd been in September. He said, as I recall the testimony—you be the

judges of it—not me, if your memory is different from mine. He said, "There's a slight limp which may be habitual." He said, "It seems to me he walked up and down the hospital just about as well now as he did before."

Now, we're not claiming that there wasn't some aggravation, but we are saying that whatever there was wore off, say, in January or February. Dr. Holmes—you saw the X-rays of Bert Smith, and he said this: "It's inconceivable that the man had a knee like this in September," and he saw the X-rays now—"wasn't having a lot of difficulty with it."

Bert Smith tells him he's getting worse now because the arthritis is a chronic thing and progresses day by day and year by year, and there isn't anything you can do to slow it down. The fact that he's a heavy man makes it move faster in him than in anyone else—the fact that he's overweight.

So there's a claim here, but for this Bert Smith would have worked for another three years. I say the evidence [fol. 450] on the basis that it was put to you, just doesn't justify that at all; that Dr. Morgan said, "I'm just making a guess." He wasn't even making a guess on accurate facts, because Bert Smith hadn't given them to him.

Now, Mr. Frates used in this case, the word, "camouflaging." And I'm glad he did, because if he didn't bring it up first, I certainly would have. As I've sat here since Thursday listening to this case, I wondered what it was all about. I wondered if we're trying Mr. Clark; if they're trying me; if they're trying the railroad; if they're trying to change the rule book; if they think the labor contract ought to be negotiated differently, if they don't like the rules of the transportation department, or just what the case is all about.

Mr. Frates comes in and says on the one hand, to Mr. Johnson—to Mr. Clark he said, "Well, you're in charge of those men, the trainmen and the engine crews, aren't you? You can pull them off the job any time you want if you don't think they can do the work. You can just say, 'Step down; you can't work for me.'"

And for reasons—I hope Mr. Frates explained to you—but for reasons I can't understand, he says, "Although

you have that authority, you can't go up to the same man and say, 'I don't think you can do the work. Let's give you a test to see whether or not you are able to do it.'" [fol. 451] That's the doggonest argument I've ever heard in my life!

Now, in evaluating the case, all I can ask all of you is to keep your eye on the ball. Don't get misled with block signals or fusees or torpedoes. I'm going to go into them because Mr. Frates has. But that has about as much to do with the case as the sunrise tomorrow morning. This isn't a question of, "Are unions good or bad? Are railroads good or bad? Do you like Mr. Smith? Do you dislike Mr. Smith? Do you like Mr. Clark? Do you dislike Mr. Clark? How do you feel about railroads?" That isn't what it's all about.

It isn't a question of, "Are the rules good or bad?" It isn't a question of, "How about the block signals? Should we improve the block signals?" It isn't a question of, "Should we change the duties of a flagman?" Mr. Frates has again and again and again talked about what a flagman ought to do.

On that point he says, "Why"—we all agree; everyone admits that you don't have to go behind the block. Well, yesterday when I was cross examining Mr. Bert Smith and I read him his testimony before—and I said, "And I asked you this question and did you give this answer under oath," and he said, "Yes." "How far back would you go when you go back to protect the rear of the train?" "There's no specified distance other than saying when you go back, [fol. 452] you go back behind the block. You will never wait for the block to stop the following train."

Now, in the light of that testimony, how he can say you don't have to go back at all; that isn't necessary; that isn't done at all"—here's Mr. Delk. "The block system, if it's functioning properly, will indicate there's a train ahead on the same track, will it not?" "Yes. If the flagman—we're not too smart, but if we go back a sufficient distance to see that block, we know that there's a train in that block. We walk back and see a red block and we know it's causing that, because the train is in the block."

From that testimony I don't see—

Mr. Frates: Your Honor, that is a distortion of the part of that testimony that was read. It's improper form to read it, and I submit, your Honor, if he's going to read it that he ought to continue on reading it. In that continuation of the deposition he said they didn't have to go back to the block.

Now, I submit that Mr. Sullivan has picked up the deposition just as he picked up the testimony, and he's read part of it and it's not proper to read that part and leave out the other part, to the jury.

The Court: I'll overrule the objection in the closing argument.

(Mr. Sullivan resumed and concluded his argument to [fol. 453] the Jury as follows:)

Mr. Sullivan: Mr. Delk also said, "There's no particular rule as to how far back you have to go. On other railroads there are rules where you have to go back a mile or a mile and a half."

But when you get down to the whole thing, I think, you keep getting back to Rule 99, and again, this hasn't a doggone thing to do with this particular case. But Mr. Frates has brought it up, so I think I've got to answer it.

He says, "When a train stops under conditions in which it may be overtaken by another train, the flagman must go back immediately with signals to insure full protection, placing two torpedoes and when necessary, in addition, lighted fusees."

If you go back a sufficient distance you have to put down torpedoes; if you don't go back a sufficient distance of the train when it explodes the torpedoes when it stops, you might say, "Well, don't go out at all."

So in terms of how far back you go—both of these men have said it—"You go back behind the block." Mr. Frates has said we're apologizing for the block signal system. That isn't so at all.

But I think the evidence is overwhelming that there's one main purpose that a flagman is there for; that on a day-to-day basis he doesn't have to do much. He has a [fol. 454] soft job, an easy job, but he's there if and when there's an emergency.

But if anybody says that anything that's mechanical can't fail, he's fooling you. He's there if and when that happens. Mr. Frates is absolutely right when he says, "If that signal goes out there's a yellow light behind it." But we all know, simply from living around here, that you can have storms; you can have hurricanes; you can have anything under which you get emergency conditions, and you get power failures.

That's one of the reasons we went into this train order proposition today, and I'd like to mention that, too; that every so often block signals will be reported as inoperative. This one and this one and this one—it makes all of them inoperative.

Now, what happens when an engineer comes up behind, when he comes up to the one here; he sees a yellow flashing light. He's expecting a yellow flashing light, because he's already gotten a message that those three are out.

So he proceeds under control. Suppose a train is stopped there for some emergency condition, and no flagman goes back. That engineer is proceeding on the basis—he's proceeding at reduced speed, but proceeding on the basis that there's nothing ahead of him. And unless you have a flagman back there, you've got nothing. That's one of the occasions.

[fol. 455] So this discussion about how far can you see a man down the track; how far can you see a fusee—now I think Mr. Bert Smith said, "I don't take no chances. If you're going to have an emergency you better have a margin—you better have it on the side of safety. You better go back a little further."

Now, in terms of curves, Mr. Frates brought that out. He said, "Why didn't we bring him pictures of curves on the railroad? If there are no curves on the railroad—the witness testified to that—why didn't he bring us the pictures?

The other thing is this: That when Mr. Baumberger was testifying yesterday, Mr. Baumberger was testifying about various distances you can see things. I thought all of his testimony was somewhat exaggerated as to distances. Every time I started to pin him down from West Palm Beach to Lake Worth, his answer was, "No; there's a

curve in there." "Or how about down around Lantana?" "No, there's a curve in there." "Can you see from here to Buena Vista?" "No, there's a curve in there."

So, naturally, if there's a curve, unless you've got X-ray vision, or unless the area is completely undeveloped, you're not going to see around the curve. That's all there is to it. If you have a curve, you've got to go even farther back. [fol. 456] Now, again, gentlemen, talking about this—and it hasn't a blessed thing to do with this case—Mr. Frates admits that under certain circumstances the road foreman of engines or the trainmaster can relieve any of these employees that they don't think are fit for duty. They can just go up and say, "Step down."

He says at the same time that he can't give them a test. You can look at him from a distance and pull him off, but you can't give him a test to see whether or not he can do it. And that's just absolute, utter hogwash.

Judge Pearson is going to instruct you that among other duties on the part of a railroad, is the duty to provide fellow-employees with reasonable safe employees to work with. And they can't just arbitrarily give any kind of test they want.

Certainly, included in that duty is the right to give tests to certain employees; that they do it every single day out here. Mr. Johnson wouldn't let an engineer go up and down the line unless he checked him out. He wouldn't let a fireman go up and down the line.

I don't know whether Mr. Frates is claiming there's an exception for flagmen or not. He says, "They've never given this kind of test to anybody else." Take with that, the fact he said, "Bert Smith is a legend on this railroad." He said, "I think Bert Smith is a character." I don't know [fol. 457] if those are the words I'd use to describe Bert Smith, but how many flagmen are there where you have the particular problem you have with Bert Smith?

Now, as Mr. Frates has said, they were out to get him. If they were out to get him, what they would have done was given him an efficiency test. Mr. Johnson would have gone up in the engine and blown a flag out and Bert Smith would have gone back along the track at any place they chose to stop the train.

Instead of that, they talked to him in advance; they wrote a letter; they said, "Bring a representative with you." Mr. Bert Smith brought two, and if he can claim under those circumstances they were out to get him, he can make any claim at all.

Now, he says, "What about the area where the test was made?" He started talking about Mr. Delk. I was just waiting to see if Mr. Frates, acting for the plaintiff, was going to call Mr. Delk as a witness, and I sort of sat there and wondered why he didn't, if he could reach up to St. Augustine to pull Dr. Lockwood down here, but he didn't want to reach to New Smyrna Beach to bring Delk down here.

I think the answer is this: That Mr. Baumberger tells one story and Mr. Delk tells another, and Mr. Bert Smith tells the third.

Let's start with the question of the wire. Mr. Baum- [fol. 458] berger says it was a cut piece of wire sort of flattened out. Mr. Delk—and I purposely avoided reading his testimony because I wanted Mr. Frates to read it to you. I wanted it to come from him in the light of the testimony he put on.

Mr. Delk said that it was a fastened hoop. It was a hoop all together. Mr. Bert Smith said it was a piece of fastened baling wire. Now, as to whether or not there was any wire there at all, I ask you to consider these facts.

First of all, Bader, the special agent, was down at mile post 355 watching these men walk south. I finally pulled it out of Mr. Bert Smith yesterday—I said, "Whereabouts was it that you saw this wire?" He said, "It was about by the fence at the end of the gas plant." And that would take it—I think I can find a picture here. Here it is right here. Here's the fence by the gas plant. He said it was by that.

Mr. Bader watched those people walk down the track. He said nobody fell during the time he was looking at them, which was way beyond the gas plant. They practically went out of sight, and then he went down to the crossing.

The next thing, if Mr. Bert Smith had fallen on a piece

of wire, he had two representatives there with him who were to advise him; to look after him; give him advice; take care of him if anything went wrong.

What's the undisputed evidence as to what happened? [fol. 459] The two men he had there to look after him walked off and left him. That is the long and short of it. It's uncontradicted. They walked off and they were down at the mile post when Bert Smith was up at about—had traveled a total of about 3000 or 3300 feet, somewhere in there. They walked away from him.

So if he had fallen, in the first place, they would have gone back and probably called the test off. But they didn't. They simply walked in the opposite direction. They had gotten up to where Mr. Clark and Mr. Johnson were—again the testimony is undisputed—it came from Delk; it came from Baumberger; it came from Clark and Johnson. There wasn't one blessed word about a piece of wire at that point.

They talked about the weather. They checked their watches. They saw how long it would take them to get down there, but not one word about a piece of wire, until late that day when the word came back after Clark was back at the station and checked back through his clerk to see how Mr. Smith was doing with the doctor.

That's the first time. So I think you can forget about the wire in this case.

Now, let's take Mr. Smith and Mr. Delk and Mr. Baumberger, as to where Bert Smith fell the second time. Mr. Delk said, "I went back there and looked around." He said, "There wasn't anything there. There might have been a [fol. 460] rock or two—a piece of ballast along the track." He said, "That's all I could find where Mr. Smith fell when I saw him up by the mile post." He said, "I think he fell from exhaustion."

Mr. Baumberger: "No, I didn't look at it." Mr. Bert Smith says, "Well, I was walking along. It was a dry day; it wasn't raining. The ground was dry. I was walking along and there was some water in a gopherberry bush, and that's what caused me to fall."

Well, there were no pictures even brought in by the plaintiff in this case—the evidence as to where Mr. Smith

fell when he was up closer to 356 mile post. Look at these pictures—that he fell out in the open, walking between the two tracks.

Now, there's a lot of talk about rock ballast. I think you can go up and down railroads practically from coast to coast and you can see just about the same kind of tracks you see here—rock underneath. You're going to see crossties and you're going to see rails. And they put it there as ballast for inclement weather, in all sorts of conditions for the men to make the smoothest roadbed they can.

There's a claim that—look at the pictures, I ask you, when you go back for your deliberations. Look and see if they are the boulders or the outsized rocks that the plaintiff is claiming. We won't tell you that this was a paved highway, and Mr. Frates is saying—"I don't say they had [fol. 461] the duty to give him a paved highway, but this was a terrible right of way; this was unnecessarily rough." Well, look at the pictures and take into consideration that four of these men walked mainly down the center of the track here, and that each one of them—well, you didn't hear from Mr. Delk or Mr. Clark, but Mr. Baumberger is a man 66; Johnson is a man 67. They walked down that track. Not one of those men is a four-minute miler, either. Two of them walked a mile in 19 minutes; two others walked it in 23 or 24 minutes.

At the end of 33 minutes Bert Smith was about 3000 feet up the line. In terms of the test they gave him—and I said on opening statement, "The evidence is going to show that they didn't ask him anything that he wouldn't have to do as a flagman." Most of the time a flagman doesn't have to do anything, but when he does he has to go out, walk back to protect the rear of the train.

I'm not going to go into block signals and torpedoes and the various rules. I think that's—Mr. Smith might say, "You go behind a block signal." He has to walk back a certain distance. Even in giving train tests, or brake tests, rather, in Ft. Pierce, he has to walk all the way around one of those trains, and that certainly isn't a mile.

But the distance is considerable if you walk all the way down and then back again. Mr. Baumberger yesterday, when I was asking him questions, I said, "Do you know

[fol. 462] what the test was to consist of?" And he said, "They told me it was a walking test." He said, "That's the only kind of a test you can give a flagman."

And I wrote that down just the way he said it so I wouldn't forget it. He said, "That's the only kind of test you could give a flagman, because that's all the flagman has to do."

Mr. Frates, going back to the place they asked Mr. Smith to take the test—there's evidence that they picked this particular place because there was one road crossing in there. They didn't want a lot of road crossings back and forth so there might be any claim of traffic going across them or something like that.

They picked an area where there was exactly one road crossing, to minimize any possible danger there. In terms of grass or weeds along the right of way, I'm not going to deny—and the pictures obviously, show that there was grass in there—to say that, and Mr. Frates has waived those rules at you saying, "They're not supposed to have grass in there."

If he can come up with some solution whereby no grass or weeds ever would grow in Florida in August, September and October, I think he can resign from his law practice and spread the information, because he'll make far more money from that than he ever will practicing law; [fol. 463] that in terms of the right of way; grass; weeds —certainly, you can't let the thing be overgrown or hazardous.

But, again, look at it here: If you remove it, you simply got to wait for it to grow to a certain point before you can remove it, anyway. Mr. Baumberger yesterday said that there are doggone few places you won't find grass and weeds in September.

Look at the pictures in the light of the testimony as to where Bert Smith fell each time, and I think the testimony is—you'll find that he was walking along between the tracks here, between the passing track and the southbound main. He says he stumbled about in here.

Now, there was no grass or weeds where he was walking there. Look at the other two where the poles are, where he fell, evidently the second time, according to his tes-

timony. I don't think he ever fell the first time where he said he did. Where he fell the second time there was no grass or weeds there.

Mr. Clark said when he saw him fall another time, he was about up by the mile post or the whistling board. Now, it's true that what Mr. Smith describes as gopher-berry bushes there—that isn't what caused him to fall. The thing that caused him to fall was that he had a chronic progressive arthritic condition; he was overweight; it was hard for him to move. He was unable to do what his normal [fol. 464] duties as a flagman were, and when they gave him a chance to do it—bring along his own witnesses, so to speak—he couldn't do it.

Now, again, as I said, this isn't a case of, "Do you like somebody or don't you like somebody?" It isn't a case of, "Were you out to get Bert Smith?" The question here is, in terms of the area where they asked to give the test, did they use reasonable care in selecting that area, or didn't they?

That's what it comes down to. And, as I say, keep your eye on the ball. And all the way through this case, the one thing in my mind, all along, has been—and I can see Mr. Frates coming in—if Mr. Bert Smith had gone out, say, on a good rainy night when there was a crossing accident or something, and he had gone back, walking along the track, maybe by Lake Worth or north of West Palm Beach, and walking along that track with a lantern, alone—not with two witnesses—not in the daylight as he did here, and he stumbled and fell and an oncoming train came on and ran into the train headon—I just wonder what the argument in that case would have been as regards Bert Smith and his ability to work for the railroad.

As to where they gave him the test, I think you can forget about this wire proposition. That's something that came up afterwards, and as to the other, we are not claiming that he had a paved roadbed—that the right of way or the track where they asked him to walk was no better or [fol. 465] no worse than it was in any other comparable track along the railroad.

I think what the case comes down to—and it gets back to camouflage—that if you think, and I think Mr. Frates

concedes it indirectly, that if you think the railroad or its supervisory officers have a right to check personnel to see if they're reasonable safe—and I don't think there's any case here because there isn't any other evidence in this case.

That's just about what it comes down to.

Thank you.

(Rebuttal Closing Argument of Plaintiff's Counsel)

Mr. Frates: If your Honor please, I'll just take a few more minutes and I want to answer Mr. Sullivan's last statement. And I put this question to you, in view of the evidence from the witness stand, that Dr. Lockwood said that in every type of test that he knew about he had participated in, or a member of the medical department had participated. That's the way they had done it on the railroad for all the time that he had been on there, for years and years and years, and was familiar with the various duties and responsibilities of the man.

Let's assume for the sake of this argument, that this test was authorized by the rules; that they had a right to make this test. I ask you, gentlemen, if it would be wrong for them to take a man out there, and let's take a [fol. 466] hypothetical case of a man who had a heart condition, which they knew about, and they took him out there when they had made other tests—and let's assume for this case, they had made other tests of this very nature to determine whether the people were physically able to do their job, and they say, "Here's a man that's got a heart condition. It could be legs; it could be anything, but let's take a heart condition," and they take him out there—laymen, railroad men, who have always worked with the doctors in giving these tests, and they go out and they judge medically whether it's right or not.

And they go out there and give the man the test, and as a result of that, he has a heart attack. Now, I ask you, would that be wrong? Would they be responsible for it? Of course, they would. And they're just as responsible and just as wrong in this case, even if they gave these tests

every week, to people, to go out there without a medical man, because let's again, assume that they had the right to make the test; that Bert Smith couldn't do it.

Let's assume all of that. And if they went out there, as they did, without medical authorization—let's say, without medical authorization, not necessarily tagging a doctor along, although they could have done that very easily, which they didn't do—and let's say they're right about everything else, and there was nothing wrong with the track. It was perfect.

[fol. 467] And Bert Smith, by virtue of his physical disability, fell and hurt himself. Gentlemen, that's wrong and they'd be responsible for it because they would be careless and negligent.

I waited a long time for Mr. Sullivan to tell you why this was the only case since 1898 that they did this kind of test on this kind of man without authorization from the medical department. I was waiting a long time to hear him answer that, and there is no answer to it, other than they were out to get rid of Smith.

And there's no answer to it when you read this letter. Gentlemen, read this letter when you go in there, and ask if Smith is being singled out for special treatment by the railroad.

Mr. Sullivan wants to get off on—he says the block system doesn't have anything to do with how far you can see. All of these things don't have anything to do with it. We must be looking at a different case. I say they've got everything to do with this case, because they are part of the entire operation of the Florida East Coast Railroad, and Bert Smith was doing his job on that railroad as they wanted him to do the job.

And I waited for Mr. Sullivan to tell you why, in 37 years of railroading, this man had never received a demerit for flagging. I waited to hear that, and I didn't hear it.

[fol. 468] And when he had been in the same—and their own witnesses—the same general physical condition as he was when they made this test.

Now, he talks about the debris, the weeds, and so forth, on the tracks. Gentlemen, he's telling you; he's telling the Railroad Commission of the State of Florida which

tells the railroad, "You shall keep those free of weeds and things of this nature,"—he's telling them, "We're not going to do it."

I think that's what I understand him to say, because this is a mandatory order by the Railroad Commission, your railroad commission, to this railroad, that where men are working and around, that you shall keep this area free and clear of grass, weeds, mud, debris and similar obstacles.

And he tells you, do I know how to keep the weeds off there? Yes, I know how to keep the weeds off, and so does he. They've got weed killer and machines that can run over there and kill those weeds off. And they do it once a year, and they could do it more often than that and they'd never have a weed on the railroad. And a lot of railroads don't have weeds on their railroads on the right of way.

And it's a relatively simple thing, and that's why the Railroad Commission—have hearings on these things before they pass these things. The Florida East Coast par-
[fol. 469] ticipated in this hearing where this order was issued to them. Get this stuff off of your right of way where men work. And why? Because men will trip and fall and get hurt on it. That's the reason for it.

But Mr. Florida East Coast says, "We're not going to do it." Now, they talk about the inconsistency of Pete Baumberger's statement and Delk's statement. Gentlemen, I submit to you that there's always inconsistencies in any version of an accident, and I think that Pete Baumberger and Delk were more concerned with the physical condition of Smith than they were about looking around to see what was there.

He talks about the railroad has a right and is obligated to its fellow-employees. Gentlemen, is there any railroad man who has come in here and told you that Bert Smith hasn't done a good job flagging? Has there been one? Has there been anybody that's worked with Bert Smith and told you that he hasn't done a good job, a satisfactory job and complied with the rules for flagging? Not one.

Who is complaining? They've got themselves in a well and they're trying to crawl out, and they want to change

the rules. He talks about it. Mr. Clark wants to change the rules. Mr. Clark wants to tell you why you have to go back behind the block.

Then we find out that Mr. Clark doesn't know—the head man from the operation department doesn't know how [fol. 470] the block system works. Mr. Sullivan said, "I was waiting for Mr. Frates to read to you about the wire on the tracks."

Now, gentlemen, if I ever heard something that I didn believe, that's it. Why did he skip over these things that I read? To hear me read them? About the wire that was all over there—and when he fell he got mixed up in a piece of wire.

When he first read it he didn't read to you about getting mixed up in a piece of wire. He picked out a sentence over here where it said he just fell. And did he want me to read this? Why didn't he read you this that I had to come back and read, "They could have picked the whole railroad and never have picked a worse spot to have a man walk than they did."

His witness; and I'm willing to go along with him on that. Now, gentlemen, I could say a lot more about this case but I think you've listened very carefully to the evidence. Mr. Sullivan comes along and talks about power failures. I'm sure he knows that this system works on underground power, and that if it doesn't work it's black and it's a stop signal. If they have a power failure anywhere on this, all of them go out and the train doesn't move.

He says it's got nothing to do with it, buf that's all they've tried, is this block system, because they'd have you believe it's necessary to come back a mile. And, gentle- [fol. 471] men, it's not necessary to go back a mile, because we've shown by the evidence in this case that at the fastest speed the train can go it can stop in less than a half mile.

I submit to you that they were wrong, and that the fellow who has given the railroad 37 years of his time and has done a good job, evidenced by the lack of demerits, is entitled to receive better treatment than he did. They were wrong; they were careless; they were negligent, and under

the law that's applicable in this case they should compensate for it.

Gentlemen, as to the amount that you think he's entitled to; as I said, I think he's clearly lost, under the uncontradicted evidence in this case—and he talks about Dr. Holmes. Dr. Holmes said the same thing that Dr. Morgan did, that a fall or an injury would cause him to be disabled occupationally. There is no medical disagreement in this case.

Mr. Sullivan talks about the other doctors. Why didn't he bring the other doctors here? We didn't bring them because we brought the ones that we thought were material. We could try this case for Sunday and Monday and Tuesday and Wednesday. If he thought there was anything material, he has the right to bring them, to subpoena them, to read their depositions.

He reads one deposition of Dr. Manson, where back before this accident he had arthritis in his left knee. Well, [fol. 472] he had Dr. Lockwood on the stand, who told you that just before this accident his arthritis was in pretty good shape, in both legs. He didn't say anything about that, but that's the condition of Smith before this so-called Smith test was performed.

Gentlemen, it goes right back to the very thing. This is not a question of technicalities. This is a question of right or wrong. If they're wrong they ought to pay for it, and I submit to you under the total facts in this case, and under the law they're wrong and they caused this man to lose three or four years of work. They've caused him to experience considerably more pain, and they should pay for it.

This is the only day that he has in court. Whatever you decide—whatever you put on that verdict—that's the end. He can't come back in three or four years and say, "I'm sorry. Things have turned out a lot worse than I expected, or the doctors expected." He can't say that. Whatever you put on there is what the verdict will be. This is his only day in court.

I want to again, thank you for your kind attention. I'm sure that Mr. Sullivan and the judge appreciate the fact that you have given your Saturday afternoon. And I want

you to know one thing, that as far as I'm concerned, whatever your verdict is, is going to be satisfactory to me.

I might like it; I might not think it's enough, but I know [fol. 473] that you have listened to this case. I'm convinced that under the evidence in this case, under the facts and under the rules and under the law and the rules of this railroad, they're wrong and Bert Smith is entitled to a verdict.

Thank you.

Charge to Jury

The Court: Members of the trial jury, you have heard the evidence in this case, and the argument of the respective counsel. It's my duty now to charge you on the applicable law.

This is a suit brought by Bert Smith, known as the plaintiff, against John W. Martin, as Trustee of the Florida East Coast Railway Company, known as the defendant.

At the outset it might be best if I would briefly explain to you the nature of your duties, as well as the duties of the lawyers and my duties, so that I can then tell you about the particular things that you are called upon to decide in this case.

The plaintiff and the defendant are here because the former seeks redress from the latter for an alleged wrong. The lawyers are here representing the plaintiff and the defendant because, as officers of this court and spokesmen for their clients, they aid the Court in the questioning of the witnesses and the presentation of the evidence upon which you are to base your decision.

[fol. 474] I am here as the presiding judge to decide questions of the law that arise in the trial, and to preside over the trial, generally, and to charge you at the conclusion of the evidence and testimony on the applicable law for your consideration.

You are here to decide questions of fact which have arisen. Your decision of these questions must be based solely on the evidence presented to you here, and upon

that alone. The issues of fact in this case are the matters which have been alleged on the one side and denied by the other.

Your duty as the trial jury is to calmly, fairly and dispassionately consider all the evidence in the case, and from it and from the law which is charged to you at this time before you retire to the jury room, arrive at your verdict. You are not to be swayed in the performance of your duty by prejudice, sympathy or any other sentiment, nor should you base your verdict upon speculation or guesswork.

You are the sole judges of the evidence, its weight and the credibility of the witnesses who have testified in the case. In deciding what weight should be given to the testimony of a witness, you can properly consider the witness's manner and demeanor while testifying; his interest or lack of interest, if any, in the outcome of this case; his bias or prejudice, if any; his ability to detail to you cor- [fol. 475] rectly the facts or matters as to which he has testified, and the reasonableness of his testimony.

Your common sense and everyday experience should aid you in determining the truth. Where the testimony is conflicting you should reconcile it if you can. But if you can not do so, after considering all the evidence and the testimony, you are privileged to disregard so much or such parts of it as you deem unworthy of credit.

Therefore, if in consideration of any of the testimony of a particular witness, as adjudged by the rules which I have stated for you in weighing the evidence, you believe such testimony is not true, you have a right and a duty to disregard or ignore such testimony in arriving at your verdict.

This is a negligence suit, and the plaintiff has the burden of proving his case by a preponderance of evidence. By a preponderance of evidence is meant the greater weight of the evidence. If you will assume for a moment that we have here in the courtroom a pair of scales of the type which are often depicted by painters or illustrators in courtrooms or legal buildings, which scales are the type which have two saucer-like receptacles on each side and are suspended on a bar and are evenly and equally balanced by a fulcrum in the center—and such scales are used by

placing an object of a known weight on the one side and an object to be weighed on the other—if you will assume [fol. 476] for a moment that we had such a pair of scales here in the courtroom, and that the evidence in this trial was susceptible to being accurately weighed, and you take the evidence and the testimony supporting the issues of the plaintiff on the one side and place it on the scales, and the evidence or testimony supporting the position of the defendant on the other side, and then when you have placed the evidence in such a way, the evidence of the greater weight will cause these scales to become unbalanced—that is, they will not be in balance, but will go up or down on the one side or the other, it may be properly said that there is a preponderance of evidence on the side which shows the greater weight. If the scales stayed evenly balanced, then there would be no preponderance of evidence.

Because of the interstate character of the railroad operation which gives rise to this litigation, the case is governed by federal statute enacted by Congress. By this statute the defendant is liable in damages to any person suffering injury while he is employed by the defendant, if the injury results in whole or in part from the negligence of any of the officers, agents or employees of the defendant.

The plaintiff charges that he was injured and his injuries resulted in whole or in part from the negligence of the defendant's officers, agents or employees.

The defendant denies the plaintiff's charge, and the [fol. 477] effect of this denial is to impose upon the plaintiff the burden of proving his charge by a preponderance of evidence.

The doctrine of comparative negligence is applicable in this case, which means that you may consider in your deliberations, the question of the negligence of the parties. If you find that the injury alleged to have occurred is the result solely of the negligence of the defendant, of course, the plaintiff would be entitled to recover.

If you find that both parties contributed in any degree to the negligence which caused the injury, then you may weigh what the negligence of the plaintiff was, and what the negligence of the defendant was.

If you find that the plaintiff was injured solely as the proximate result of his own negligence, and no other negli-

gence was found of the defendant, then he could not, of course, recover.

If you find that the defendant was negligent and that the plaintiff was also negligent and the negligence of both contributed to the accident, you must reduce any damages that you assess by the amount that plaintiff's negligence contributed to his own injury, that he may have received.

An employee is under a duty at all times to take reasonable care for his own safety. If he fails to do so, and such failure is the sole, proximate cause of an injury which [fol. 478] he receives, he can not recover from the defendant.

A party is liable for all the consequences that reasonably flow from or follow a wrongful act, whether actually contemplated or not, and the wrongful act being once established, the wrongful act extends to all the consequences that proximately, reasonably and naturally flow from such act.

A railroad has a duty to exercise reasonable care to employ employees who are competent to do the work required. Likewise, an employer has a duty to exercise reasonable care to retain only such employees who are competent.

A railroad has the duty to use reasonable care in furnishing employees a safe place to work. However, a railroad is not required to guarantee to any employee absolute safety under every circumstance. It is required only to use such care as the circumstances reasonably require.

If you find from the evidence that the railroad exercised reasonable care in providing plaintiff a safe place to work, your verdict should be for the defendant trustee.

In determining whether or not the defendant was guilty of any negligence which results in whole or in part to the injury of the plaintiff, I charge you that negligence is a lack of due care under the circumstances, or the failure to do what a reasonable and prudent person would ordinarily have done under the same circumstances or situation.

[fol. 479] Or negligence may be the doing of what such a person under the existing circumstances would not have done.

Let me repeat that to you, because my own reading of it made it not clear. Negligence is a lack of due care under the circumstances, or failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation, or the doing of what such a person under the existing circumstances would not have done.

It was the duty of the defendant to have used ordinary care and prudence in furnishing to the plaintiff a reasonably safe place in which to work, and to have used all reasonable precautions to maintain and keep such place in a reasonable safe condition.

I further charge you that a railroad must make proper tests and inspections to discover dangers in a place where its employees must work, and after ascertaining the existence of such dangers, if any, must take reasonable precautions for the safety of its employees.

The law recognizes that a person's property may become unsafe without fault on the part of the owner. Therefore, the law is that a person has a reasonable time to discover such unsafe condition, and in addition, has a reasonable time within which to correct it.

Therefore, even if you find that the right of way was unsafe, if you also find that the railroad did not know [fol. 480] about such defect long enough before the accident to have had time to remedy it, or did not actually know about any defect and did not have reasonable time in which to discover it and remedy it before the accident, you should find for the defendant.

Mr. Sullivan: Your Honor, if I could interrupt, that was the charge we had requested, and I would suggest it be amended to say that there could be no finding against the defendant for that reason.

As I admitted it, I think it was probably incorrect.

The Court: I don't reflect what part of it you say that I need to add to it. I will give you an opportunity to call it to my attention when I have completed the instructions after we have gone through them, and I will recharge it if I have erred.

Mr. Sullivan: Excuse my interruption.

The Court: I instruct you that the railroad having se-

lected the place where the test involved in this case was given, was under a duty to determine that such place was in a reasonable safe condition for the purpose of such test.

If you find that the negligence of the defendant has proximately caused any aggravation of a previously existing disability suffered by the plaintiff, it would then be your duty to assess damages against the defendant lim-
[fol. 481] ited to the amount of damages caused by the aggravation of such pre-existing condition.

I charge you that where a person is suffering from a disease or illness which is aggravated by the wrongful act of another, he may recover for the amount of aggravation of such disease or illness so caused, but not for the disability from such disease or illness previously existing.

If, under the Court's instructions, you should find that the plaintiff is entitled to recover damages from the defendant, it will then be your duty to determine the amount of such recoverable damages. In doing so, you may take into consideration the following: (1) The earnings, if any, which the plaintiff has lost in the past because of the aggravation of his pre-existing condition by his injury. (2) The expenses for hospitalization and for medical care, treatment and other expenses, if any, which he has paid or is obligated to pay in an effort to effect a cure or alleviation of any pain, suffering and sickness caused by aggravation of his pre-existing condition by his injury. (3) The physical pain and suffering, if any, which he has suffered in the past because of the aggravation of his pre-existing condition by his injury herein. (4) The personal inconvenience, if any, which he has suffered in the past because of the aggravation of his pre-existing condition by his injuries.

If you find from the evidence that the plaintiff was
[fol. 482] permanently injured to any extent, or that he will continue to suffer in the future to any extent as a result of his injuries herein, you may take into consideration his future physical pain and suffering; his future personal inconvenience and sickness, if any; the loss or diminishing, if any, of his earning capacity; and the consequent future monetary loss; the future expenses, if any, for medical care and treatment, and other future expenses,

if any, which may reasonably be expected he shall incur in a future effort to effect a cure or alleviation of his pain, suffering or sickness resulting from his injuries alleged herein.

In determining the amount, if any, that you should award for future impairment of earning capacity, if any, you must reduce such future loss to its present money value. And in determining such amount, you may take into consideration the life expectancy of the plaintiff, as indicated by the mortality tables read into evidence in estimating his life xpectancy.

How er, you are not required to be bound by such tables. They may be considered, together with all other pertinent and material evidence in the case which will aid you in estimating such life expectancy.

However, the amounts, if any, that you award for future pain and suffering and future personal inconvenience should not be reduced to present money value.

[fol. 483] I instruct you that evidence of life expectancy as derived from the mortality table, is a guide to the jury, to be considered by you along with all other evidence. But it is not an absolute figure to be used in determining the life expectancy of any particular person or persons.

In arriving at your verdict you must be fair and just. You must not be swayed from a fair and just determination by any sympathy that you might feel for either party. Sympathy is not a consideration that may be allowed to enter into your deliberations as jurors. Sympathy has no place in the trial of a lawsuit and in the making up of your minds as to what your verdict should be.

You should not permit that element or any other emotional elements to enter into your deliberations whatsoever.

If you believe from the evidence that the plaintiff is entitled to a verdict, you should assess only such damages as are reasonable, and you can not base your verdict on conjecture or speculation. It must appear that the plaintiff will suffer such damages as you assess with reasonable certainty.

To the members of the trial jury, when you retire into the jury room one of your first duties will be that of selecting one of the six of you to serve as your jury foreman,

that foreman to be your chairman, to conduct your deliberations in an orderly manner and see that each of the [fol. 484] fellow-jurors has the opportunity, as well as he himself has, to fully express himself in your discussions before you take your vote.

Remember, to the members of the jury, you are not partisans or advocates in the case, but you are actually the judges of the facts. The final test of the quality of your service will lie in the verdict which you return, and not in any opinion that you may have entertained before you have listened to and considered the view and opinions of your fellow-jurors.

Bear in mind that you can and will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. There will be no triumph over justice unless you shall find and declare the truth of the matter by your verdict.

Any verdict which you return must be a unanimous verdict. That is, it must be concurred in by each and all of you.

The Court has admitted into evidence during this trial certain exhibits. These exhibits are available to you when you step down into the jury room, or they may be called for by any individual juror merely by rapping at the door and asking the Court Bailiff to bring them out. The Court Bailiff will be stationed outside the jury room door at all times while you are deliberating.

[fol. 485] The Court has requested the Clerk to prepare forms of verdict in this matter, which have been examined by the Court. You will execute only the applicable form of the verdict which states your final decision. You will complete the form of the verdict and have the foreman sign it on behalf of all six of you, and will date it the proper date, which is today, being July the 27th, 1957.

Mr. Bailiff, will you tender to this jury or hand to one of the members of this jury, the forms of verdict which have been prepared by the Clerk, and conduct them into the jury room for their deliberations?

Mr. Sullivan: Judge Pearson, before the jury is excused, I would like to amend that charge. As I listened to

it—I wonder if your Honor could reinstruct the jury on that charge?

The Court: I think I'd take them out, and both you and Mr. Frates look at it and if it's not correct we'll bring them back in.

Take them out now.

(At 3:42 o'clock p.m. the jury retired to consider of their verdict, and the following proceedings were had out of their presence:)

Mr. Frates: I certainly object to calling them back and reinstructing them, on instructing them on that specific charge.

[fol. 486] Mr. Sullivan: Your Honor, I think that should go in, or that instruction ought to be revised, that you shouldn't find against the defendant for this reason—

Mr. Frates: I strenuously object, Judge. I think it's a prejudicial charge, in the first place, and calling them back in and reinstructing them just gives it that much more emphasis.

Mr. Sullivan: Your Honor, I think it ought to be either deleted—that paragraph in its entirety, or say, "You should not find against the defendant for that reason," referring to the second paragraph.

Mr. Frates: Judge, it's a very damaging charge to the plaintiff in calling them back in and reading one charge.

Mr. Sullivan: Your Honor, you can read any other the plaintiff chooses.

Mr. Frates: Read all of them, then.

Mr. Sullivan: Your Honor, unless you construe the question of whether they have a right to give a test or not —is an issue for the jury. I think the charge is correct, but in the light of your ruling reserving the decision on my motion to strike, I wanted to in effect, enlarge the scope of the charge.

There are other issues submitted to the jury. That's why I called your attention to it.

The Court: I will note in the record that it has been [fol. 487] called to my attention following my charge.

I'm sorry I couldn't understand what your statement

was when I was charging them, but I will note it has been called to my attention.

This is Defendant's requested instruction 6-A. I will not attempt at this time to charge the jury further. If I have erred, I will consider it at post-trial motion.

Gentlemen, let's be at recess, ourselves, noting your exception to my other charges, and we'll leave the jury in the custody of the Bailiff until we are notified to reconvene.

(Plaintiff's Exhibit No. 1, and Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O and P were taken into the jury room at 4.33 p.m. at the request of the jury.) (At 6:07 o'clock p.m., the jury returned their verdict, and the following proceedings were had:)

The Court: Will the record note the return of the trial jury to the courtroom.

Have the members of the trial jury reached a verdict in this matter?

The Foreman: We have.

The Court: Does the verdict speak for all six of you?

The Foreman: It does.

[fol. 488] The Court: Will you tender the verdict to the Clerk so that I may examine it, please?

Will you publish this verdict in open court?

Verdict

The Clerk (reading): "In the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, at Law, No. 38384. Bert Smith, plaintiff, v. John W. Martin, as Trustee of the Florida East Coast Railway Company, defendant. Verdict: We, the Jury, find for the plaintiff, Bert Smith, and assess his damages in the sum of $30,000. So say we all. Dated at Miami, Florida, this 27th day of July, 1957. (Signed) W. D. Schneider."

The Court: Will you poll the jury, Mr. Clerk, on their verdict?

(Thereupon the Clerk polled the jury, and in response to the question: "Is this your verdict?" each juror answered in the affirmative.)

The Court: Will the record note the polling of the jury? The Court will record the verdict of the trial jury in the records, and will consider such post-trial motions as are presented to the Court hereafter in conformity with the rules.

(Thereupon the trial was concluded.)

[fol. 489] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 490] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

At Law, No. 38384

[Title omitted]

MOTION FOR NEW TRIAL—Filed August [illegible], 1957

Defendant moves the Court to grant a new trial in this cause on all of the issues therein on the following grounds:

1. The Court erred in not granting defendant's motion for directed verdict made at the close of plaintiff's case.

2. The Court erred in not granting defendant's motion for directed verdict made at the close of all the evidence.

3. The Court erred in not granting defendant's motion to dismiss certain portions of the Complaint at the close of plaintiff's case.

4. The Court erred in not granting defendant's motion to dismiss certain portions of the Complaint at the close of all the evidence.

5. The Court erred in denying defendant's motion to strike certain portions of the testimony made at the close of the plaintiff's case.

6. The Court erred in reserving decision on defendant's motion to strike certain portions of the testimony made at the close of all the evidence.

7. The verdict is contrary to law.

8. The verdict is contrary to the evidence.

9. The verdict is contrary to the manifest weight of the evidence.

10. The verdict is contrary to the law and the evidence.

[fol. 491] 11. The verdict is excessive.

12. The verdict is so excessive as to shock the judicial conscience of the Court.

13. The Court erred in denying defendant's requested instruction No. 2.

14. The Court erred in denying defendant's requested instruction No. 3.

15. The Court erred in not amending defendant's requested instruction No. 6A in accordance with request made by defendant.

16. The Court erred in instructing the jury as follows:

"The doctrine of comparative negligence is applicable in this case, which means that you may consider in your deliberations, the question of the negligence of the parties. If you find that the injury alleged to have occurred is the result solely of the negligence of the defendant, of course, the plaintiff would be entitled to recover."

17. The Court erred in instructing the jury as follows:

"If you find that both parties contributed in any degree to the negligence which caused the injury, then you may weigh what the negligence of the plaintiff was, and what the negligence of the defendant was."

18. The Court erred in instructing the jury as follows:

"If you find that the plaintiff was injured solely as the proximate result of his own negligence, and no other negligence was found of the defendant, then he could not, of course, recover."

19. The Court erred in instructing the jury as follows:

"If you find that the defendant was negligent and that the plaintiff was also negligent and the negligence of both contributed to the accident, you must reduce any damages that you assess by the amount that plaintiff's negligence contributed to his own injury, that he may have received."

20. The Court erred in instructing the jury in accordance with plaintiff's requested instruction No. 2.

21. The Court erred in instructing the jury in accordance with plaintiff's requested instruction No. 6.

22. The Court erred in ruling that the Federal Employer's Liability Act applied to this case.

23. The Court erred in allowing plaintiff to call C. T. Clark as an adverse witness.

[fol. 492] 24. The Court erred in allowing plaintiff to make a test with a fusee.

25. The Court erred in allowing plaintiff to introduce Dr. Lockwood's report in evidence.

26. The Court erred in allowing Dr. Morgan to testify about his opinion regarding the time that plaintiff's working life had been shortened by his alleged injury.

27. The Court erred in refusing to admit into evidence the book of photographs showing the railroad right of way.

28. Defendant was denied a fair trial.

29. Defendant's interest was prejudiced during the trial because of the conduct on the part of plaintiff's counsel in making statements and remarks uncalled for and intended to prejudice the jury and thereby defendant was deprived of a fair trial.

30. Defendant's interest was prejudiced at the trial because of the conduct on the part of counsel for the plaintiff in attempting to introduce obviously immaterial and prejudicial evidence and thereby defendant was deprived of a fair trial.

31. Defendant's interest at the trial was prejudiced by the conduct of counsel for plaintiff in making arguments actually addressed to the jury under the guise of making objections to the Court and thereby defendant was deprived of a fair trial.

32. The opening statement of plaintiff's counsel was inflammatory and prejudicial in nature, and intended as such, and defendant was thereby deprived of a fair trial.

33. The closing argument of plaintiff's counsel was inflammatory and prejudicial in nature, and intended as such, and defendant was thereby deprived of a fair trial.

Scott McCarthy Preston Steel & Gilleland, Dwight Sullivan, Attorneys for Defendant.

Certificate of service (omitted in printing).

[fol. 493] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

At Law, No. 38384

[Title omitted]

MOTION TO SET ASIDE VERDICT AND ENTER JUDGMENT FOR DEFENDANT—Filed August 6, 1957

Defendant moves the Court to set aside the verdict in this cause and enter judgment for defendant in accordance with his Motion for Directed Verdict made at the close of plaintiff's case and again at the close of all the evidence.

Scott McCarthy Preston Steel & Gilleland, Dwight Sullivan, Attorneys for Defendant, 627 Ingraham Building, Miami 32, Florida.

Certificate of service (omitted in printing).

[fol. 494] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

At Law, No. 38384 (Pearson)

BERT SMITH, Plaintiff,

vs.

JOHN W. MARTIN, as Trustee of the property of the FLORIDA EAST COAST RAILWAY CO., a corporation, Defendant.

ORDER DENYING MOTION TO SET ASIDE VERDICT ETC.—
October 14, 1957

This Matter coming on for hearing before the Court on Defendant's Motion to set aside verdict and enter Judgment for Defendant and Defendant's Motion for a New Trial, the Court having heard the arguments of the respective Counsels and reviewed the proceedings herein, it is therefore

Ordered and Adjudged that Defendant's Motion to set aside verdict and enter Judgment for Defendant and Defendant's Motion for a new trial be and the same are hereby denied.

Done and Ordered in Chambers at Miami, Dade County, Florida, this 14th day of October, 1957.

Ray Pearson, Circuit Judge.

[fol. 495] DESIGNATIONS OF PROCEEDINGS STENOGRAPHICALLY REPORTED DEEMED NECESSARY TO APPEAL—Filed November 5, 1957 (omitted in printing).

[fol. 497] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
AT LAW

No. 38384-L

BERT SMITH, Plaintiff,

vs.

JOHN W. MARTIN, as Trustee of the property of the FLORIDA EAST COAST RAILWAY COMPANY, a corporation, Defendant.

FINAL JUDGMENT—August 6, 1957

This Cause, coming on to be heard before the Honorable Ray Pearson, one of the Judges of the above-styled Court, and a jury of six true and lawful men, who having been first duly sworn according to law, and having heard the evidence, the arguments of counsel, and the charges of the Court, and having retired to consider their verdict, returned in Open Court the following verdict, to-wit:

"Miami, Florida

"We, the Jury, find for the Plaintiff, Bert Smith, and assess his damages in the sum of Thirty Thousand Dollars ($30,000.00).
So say we all.
July 27, 1957.

/s/ W. D. SCHNEIDER"
Foreman

It Is Therefore Ordered and Adjudged that Final Judgment be and it is hereby entered in said cause in favor of [fol. 498] the plaintiff, Bert Smith, and against the defendant, John W. Martin, as Trustee of the property of the Florida East Coast Railway Company, and said plaintiff shall have and recover from said defendant the sum of

Thirty Thousand and 00/100 Dollars, lawful money of the United States of America.

Costs to be hereafter taxed.

Done and Ordered in Chambers at Miami, Dade County, Florida, this 6th day of Aug., 1957.

Ray Pearson, Circuit Judge.

[fol. 499] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA.
AT LAW

No. 38384

[Title omitted]

ASSIGNMENTS OF ERROR—Filed November 5, 1957

Defendant assigns as error to be relied on by him as Appellant in the District Court of Appeal, Third District, for the reversal of the judgment entered in the above-styled cause the following:

1. The Court erred in entering final judgment for plaintiff.

2. The Court erred in denying defendant's motion to set aside verdict and enter judgment for defendant.

3. The Court erred in denying defendant's motion for new trial.

4. The Court erred in not granting defendant's motion for directed verdict made at the close of plaintiff's case.

5. The Court erred in not granting defendant's motion for directed verdict made at the close of all the evidence.

6. The Court erred in not granting defendant's motion to dismiss certain portions of the complaint at the close of plaintiff's case.

7. The Court erred in not granting defendant's motion to dismiss certain portions of the complaint at the close of all the evidence.

8. The Court erred in denying defendant's motion to strike certain portions of the testimony made at the close of the plaintiff's case.

9. The Court erred in reserving decision on defendant's motion to strike certain portions of the testimony made at the close of all the evidence.

10. The verdict is contrary to law.

11. The verdict is contrary to the evidence.

12. The verdict is contrary to the manifest weight of the evidence.

13. The verdict is contrary to the law and the evidence.

[fol. 500] 14. The verdict is excessive.

15. The verdict is so excessive as to shock the judicial conscience of the Court.

16. The Court erred in denying defendant's requested instruction No. 2.

17. The Court erred in denying defendant's requested instruction No. 3.

18. The Court erred in not amending defendant's requested instruction No. 6A in accordance with request made by defendant.

19. The Court erred in instructing the jury as follows:

> "The doctrine of comparative negligence is applicable in this case, which means that you may consider in your deliberations, the question of the negligence of the parties. If you find that the injury alleged to have occurred is the result solely of the negligence of the defendant, of course, the plaintiff would be entitled to recover."

20. The Court erred in instructing the jury as follows:

"If you find that both parties contributed in any degree to the negligence which caused the injury, then you may weigh what the negligence of the plaintiff was, and what the negligence of the defendant was."

21. The Court erred in instructing the jury as follows:

"If you find that the plaintiff was injured solely as the proximate result of his own negligence, and no other negligence was found of the defendant, then he could not, of course, recover."

22. The Court erred in instructing the jury as follows:

"If you find that the defendant was negligent and that the plaintiff was also negligent and the negligence of both contributed to the accident, you must reduce any damages that you assess by the amount that plaintiff's negligence contributed to his own injury, that he may have received."

23. The Court erred in instructing the jury in accordance with plaintiff's requested instruction No. 2.

24. The Court erred in instructing the jury in accordance with plaintiff's requested instruction No. 6.

25. The Court erred in ruling that the Federal Employer's Liability Act applied to this case.

26. The Court erred in allowing plaintiff to call C. T. Clark as an adverse witness.

27. The Court erred in allowing plaintiff to make a test with a fusee.

28. The Court erred in allowing plaintiff to introduce Dr. Lockwood's report in evidence.

[fol. 501] 29. The Court erred in allowing Dr. Morgan to testify about his opinion regarding the time that plaintiff's working life had been shortened by his alleged injury.

30. Defendant was denied a fair trial.

31. Defendant's interest was prejudiced during the trial because of the conduct on the part of plaintiff's counsel in making statements and remarks uncalled for and intended to prejudice the jury and thereby defendant was deprived of a fair trial.

32. Defendant's interest was prejudiced at the trial because of the conduct on the part of counsel for the plaintiff in attempting to introduce obviously immaterial and prejudicial evidence and thereby defendant was denied a fair trial.

33. Defendant's interest at the trial was prejudiced by the conduct of counsel for plaintiff in making arguments actually addressed to the jury under the guise of making objections to the Court and thereby defendant was deprived of a fair trial.

34. The opening statement of plaintiff's counsel was inflammatory and prejudicial in nature, and intended as such, and defendant was thereby deprived of a fair trial.

35. The closing argument of plaintiff's counsel was inflammatory and prejudicial in nature, and intended as such, and defendant was thereby deprived of a fair trial.

Scott McCarthy Preston Steel & Gilleland, By Dwight Sullivan, Attorneys for Defendant, 627 Ingraham Building, Miami 32, Florida.

Certificate of Service (omitted in printing).

[fol. 502] [File endorsement omitted]

Directions to the Clerk—Filed November 5, 1957 (omitted in printing).

[fol. 504] [File endorsement omitted]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

MANDATE—Dated September 29, 1958,
filed September 30, 1958

To the Honorable, the Judges of the Circuit Court for the Eleventh Judicial Circuit of Florida. Greeting:

Whereas, Lately in the Circuit Court of the Eleventh Judicial Circuit in and for the County of Dade in a cause wherein

BERT SMITH, Plaintiff,

and

JOHN W. MARTIN, as Trustee of the property of the FLORIDA EAST COAST RAILWAY COMPANY, a corporation, Defendant,

(Law #38384-L)

the judgment of said Circuit Court was rendered Aug. 6, 1957 as by the inspection of the transcript of the record of the said Circuit Court which was brought into the District Court of Appeal of Florida, Third District, by virtue of an appeal agreeably to the laws of said State in such case made and provided, fully and at large appears:

And Whereas, at the July Term of said District Court holden at Coral Gables A. D. 1958, the said cause came on to be heard before the said District Court on the said transcript of the record and was argued by counsel; in consideration whereof, on the 22nd day of July, A. D. 1958 the said District Court rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof.

In Consideration Whereof, It Is Ordered by the Court that the appellants do have and recover of and from the appellee costs in this behalf expended herein taxed at Twenty Five Dollars, and that all costs shall be taxed in the court in which the appeal was entered, therefore,

You Are Hereby Commanded, That such further proceedings be had in said cause as according to right, justice, the judgment of said Court, and the laws of the State of Florida, ought to be had, the said judgment of the Circuit Court notwithstanding.

Witness, The Honorable Charles A. Carroll, Chief Judge of said District Court, and the seal of said Court at Coral Gables, this 29th day of September, 1958.

William P. Carter, Clerk District Court of Appeal of Florida, Third District.

[Seal]

[fol. 505]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

July Term, A.D., 1958

Case No. 57-332

J. TURNER BUTLER and WILLIAM A. HALLOWES III, Trustees of the Property of FLORIDA EAST COAST RAILWAY COMPANY, a Florida corporation, Appellants,

vs.

BERT SMITH, Appellee.

An Appeal from the Circuit Court for Dade County, Ray Pearson, Judge.

Scott, McCarthy, Preston, Steel & Gilleland, and Dwight Sullivan, for appellants.

Nichols, Gaither, Green, Frates & Beckham, and William S. Frates and Sam Daniels, for appellee.

OPINION—Filed July 22, 1958

HORTON, Judge.

This was an action for personal injuries brought under the Federal Employers' Liability Act, 45 U.S.C. §51 et seq.

Final judgment in favor of the appellee was entered after a jury verdict. The appeal is from the final judgment.

Smith, 61 years of age, had been in the employ of the appellant railroad for approximately 37 years. For the last five or six years of his employment, Smith had been a flagman on passenger trains. His duties as a flagman were relatively few unless the train made an emergency stop or was otherwise delayed, in which event, he was required to set flares and place other warning signals at least one [fol. 506] mile down the track to avert possible danger from oncoming trains.

For some time, Smith had suffered from arthritis and obesity. In the early part of 1956, a trainmaster of the appellant observed Smith's handicapped condition and questioned his ability to perform the duties of a flagman. An attempt was made to persuade Smith to retire but he declined. The appellant then authorized a "field test" to determine if Smith was capable of performing the duties of flagman. This test consisted of walking a mile along the railroad track from one mile post to another, since this would coincide with the duties Smith would be required to perform under emergency conditions. After traversing some 3,000 feet of the mile walk, Smith fell in exhaustion and injured his knee. He was hospitalized, returned to his home but never returned to work. Smith attributed his fall and injuries to two factors, i.e., walking on gopherberry leaves which caused the soles of his shoes to become slippery, and becoming entangled in wire lying along the track.

The negligent acts or omissions charged in the complaint were:

(1) Requiring the appellee to participate in a field test;

(2) Allowing agents of appellant to conduct a field test;

(3) Furnishing a dangerous and unsafe location to conduct a field test;

(4) Furnishing a dangerous and unsafe place in which to work;

(5) Failure to use ordinary care in providing a safe place of work;

(6) Failure to provide a reasonably safe place to work;

(7) Failure to provide proper equipment and safeguards in the performance of duties and participation in a field test; and

(8) Failure to provide adequate supervision and instruction in conducting the field test.

The appellant's main point for reversal is the prejudicial manner in which the trial was conducted on behalf of the appellee. There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for [fol. 507] such grievance under the Railway Labor Act, 45 U.S.C., §151 et seq. Consequently we do not consider that items 1 and 2 under the charge of negligence, supra, constituted triable issues. The real issue in the case, which was apparently forgotten, was whether the appellant provided a reasonably safe place for appellee to work or perform the duties assigned him. Seaboard Air Line R. Co. v. Gentry, Fla. 1950, 46 So. 2d 485; Seaboard Air Line R. Co. v. Hardee, Fla. 1951, 54 So. 2d 809.

We have carefully reviewed the record in this cause, including the opening statements of counsel to the jury prior to the trial and the statements of counsel to the jury after the close of all the testimony, and are impelled to the conclusion that this case was tried upon an immaterial issue tending toward and resulting in an unfair trial to the appellant. A large portion of appellee's opening statement to the jury prior to the trial spotlighted the theme upon which this cause was tried, namely, that appellant was "out to get" the appellee, that the test was never given to anyone before in the history of the railroad, and was a scheme cooked up to get rid of the appellee. Appellee's counsel, in his argument after the testimony had been completed, dwelled at length on the "get rid of Bert Smith"

attitude and conduct of appellant. Appellee's concluding statement in his main argument at the close of all the testimony was:

> "Now I think you could stand up here and say that this was a dirty, rotten trick they pulled on this guy because that's my personal opinion. They were out to get him, and they did. They got him good; they got him so he won't work any more for them, and the law says—not my law—not the judge's law, but your law—says that under those circumstances they should pick up the check."

The appellee's entire case as reflected by this record conclusively indicates that it was premised upon the claim that appellant's conduct in requiring the appellee to take a field test was unlawful and that all of his injuries and damages resulted from such unlawful act. Nowhere in the pleadings has the appellee sought punitive damages. It is [fol. 508] readily apparent that the jury could have been and was misled as to what the real issues were in the case. It would serve little purpose to delineate the many incidents appearing in the record which illustrate the basis for our conclusion that the cause should be reversed. However, the immateriality of the issues raised, as well as their prejudicial effect, were pointed out to the trial judge by appellants' motion for new trial. The motion should have been granted.

An appellate court is always reluctant to reverse a judgment based on a jury verdict for in doing so, it of necessity must sit in judgment of the facts which appear in a cold typed record without the benefit of observing the demeanor and conduct of the witnesses on the stand. However, it is another matter to reverse a cause for new trial when the record of that trial clearly shows that the cause was tried on immaterial issues serving to implant in the minds of a jury prejudice or bias against one of the parties. We do not attribute to appellee's counsel sinister motives but rather an overzealousness for the interests of his client. However, when the result raises an emotional prejudice in the minds of the jury on an immaterial issue, then justice has been thwarted and the parties have been denied a fair

and impartial trial of their cause. Cf. Seaboard Air Line Railroad Company v. Strickland, Fla. 1956, 88 So. 2d 519, and Seaboard Air Line Railroad Company v. Ford, Fla. 1957, 92 So. 2d 160, 165.

In view of the opinions expressed, we do not consider it necessary to discuss the other points raised by appellants. Accordingly, the judgment appealed from is reversed and the cause is remanded for a new trial.

Reversed and remanded.

Carroll, Chas., C.J., and Pearson, J., concur.

[fol. 509] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

No. 38384

BERT SMITH, Plaintiff,

vs.

JOHN W. MARTIN, as Trustee of the property of the FLORIDA EAST COAST RAILWAY COMPANY, a corporation, Defendant.

Transcript of Pretrial Minutes—May 4, 1959

In Chambers,
Dade County Court House,
Miami, Florida,
Monday, 1:00 p.m.,
May 4, 1959.

Pretrial minutes in the above-entitled case before Hon. Ray Pearson, Circuit Judge, pursuant to Notice.

APPEARANCES:

Nichols, Gaither, Green, Frates & Beckham, by William S. Frates, Esq., of counsel, Attorneys for Plaintiff.

Scott McCarthy Preston Steel & Gilleland, by Dwight Sullivan, Esq., of counsel, Attorneys for Defendant.

[fol. 510] The Court: Proceed.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Frates: Judge, the reason I set this pretrial in this case, which is set for May 11—

The Court: That is next Monday, is it not?

Mr. Frates: Yes, sir. Frankly, I am trying this case so that we can appeal the original decision to the Supreme Court of the United States because I think it is completely erroneous. That is neither here nor there. I would intend and would offer the exact proof in the exact way it was introduced the last time, with the exception of possibly some of the wrangling.

I think that instead of having a trial where there was constant proffer of evidence and objection and dragging the thing out, that possibly as a result of a pretrial or maybe we can even submit, each side, for Your Honor, what the things and the issues apparently will be—because some of them I think are borderline cases. I do not know whether we can do that here or not.

I am sure Mr. Sullivan has an idea of what the issues would be. I think he has consistently taken a position; but again as to some of the evidence that was adduced and some of it that we might do now, I thought a pretrial could avoid some of the situation and then we could make an issue or have Your Honor narrow the issues down to a pretrial order.

[fol. 511] The Court: Anything that will help us to save our time is what I am interested in.

Mr. Frates: That is right. As I say, it is confusing. We have the decision, whether we like it or not, and we are certainly bound by the decision.

The Court: That is right.

Mr. Frates: I know that some of the evidence I would enter would be contrary to this because it would be identical. There is no sense in going through that, and taking

up the time of the Court with that procedure. I almost wish there was some way—

The Court: I pulled this opinion. I have not been living with it or anything, but I got it and have been thinking about the direction of the reversal and thinking that it would be back to be retried if it was not eventually settled. I pulled it today, noting that you had the pretrial conference, to look at it again and determine and review in my own mind the directions or the matter that I felt the Appellate Court had given us any directions on. He seems to say and he lists here your eight elements on page 2.

Mr. Frates: Yes, sir.

The Court: And he completely seems to direct that pa s 1 and 2 were improper, as I read his opinion.

Mr. Frates: Yes. I do not know what you do with situa-
[fol. 512] tions like this where I think there are actual mis-statements of fact in the opinion. I do not think you are bound by mis-statements, and that gets into the procedure. I am referring to this: "The test consisted of walking a mile along the railroad track from one mile post to another, since this would coincide with the duties Smith would be required to perform under emergency conditions."

The record is full of evidence that under no emergency conditions would you be required to walk back a mile. That was one of the things we talked about on the block system and the daytime and the nighttime and how far you could—

Mr. Sullivan: Let me note a dissent from that. I think there was certainly a contention like that by Mr. Frates. He said he should not have to walk back a mile. I would not say there was no evidence that it had not been done or would not be done.

Mr. Frates: Let me put it this way: I think this was a factual issue that a jury could have determined.

The Court: I felt so in the first instance or I would have ruled to the contrary.

It is my interpretation of his opinion here that he factually sets out a list of eight and he says "there was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or
[fol. 513] right of the appellant to give the test." I believe

the Appellate Court is telling me—and if I misinterpret that it is going to be a problem or error of the Court—that on retrial we are not going to be able to go into the propriety or impropriety of giving this particular test, although I did at the original trial admit evidence on that fact and I felt that it was a question. However, I have been reversed.

Mr. Frates: That says it about as clearly, I guess, as it could be said.

Then what are the issues in the case that are left in this opinion—as to whether or not the track is a reasonably safe place to work?

Mr. Sullivan: 3 to 8, I would say.

The Court: He does not say it is the only issue, but on page 3 Justice Horton, speaking for the District Court, says this: "The real issue in the case, which was apparently forgotten, was whether the appellant provided a reasonably safe place for appellee to work or perform the duties assigned him." That issue is certainly one that we have to try and it could be a question of whether we have any others.

Mr. Frates: Of course, as he said, it was apparently forgotten. They said that when they take this other issue, which we cited them cases and which they have yet to cite a case contrary, about a master-servant relation, the [fol. 514] law is full of the proposition. It does not do any good to argue this, as I say. When you say "provide a reasonably safe place for appellee to work or perform the duties assigned him," I think on the back they say something about—it was a question that Mr. Sullivan at one time raised whether he was even working or not. I think Your Honor ruled that out of this. Maybe Mr. Sullivan has some idea of what the actual issues in the case, and I would like some of these things to be discussed and to go through the evidence and eliminate and say that this is not an issue and here is the only issue and under this issue this is the evidence that can be adduced at the trial.

Mr. Sullivan: I will say this, Judge: We looked around. One of the things we tried to check out in research was when are you employed, at what point do you become employed. I think that the evidence we had was not completely con-

vincing. I cited one case. It was not identical. I think probably the law is beyond that point now, and we are not going to question whether or not he was employed here. I think the position we have taken on the appeal is inconsistent with that. We think he was employed.

The Court: It would be my disposition or ruling, unless there is something shown to me differently, that he was employed and that they had the right under their employment to give him the test.

[fol. 515] Mr. Sullivan: That is right, sir.

The Court: As I interpret this instruction.

Mr. Frates: Do they have a right to give him a test or did they have a right to give him that test that they gave him?

The Court: Let me read this again. That is what the opinion says. I would say the test—

Mr. Frates: With the right to give him the test, do we have the right to go in and show his physical condition? In other words, suppose there was this test that they had to give him. Knowing that he had been in the hospital and that this medical condition was there and so forth, it would seem to me that even under that issue we could show that while they might have a right to give the test, that the manner in which they gave the test was improper. Again, I would like to know whether that is true or whether that is precluded—

The Court: Do you want to be heard from before I indicate my disposition?

Mr. Sullivan: Yes.

Going back to page 2 of the opinion, they set out the 8 allegations in the complaint, and the first one is requiring the appellee to participate in a field test and the second is allowing agents of the appellant to conduct a field test. I think the opinion says "Consequently, we do not consider [fol. 516] that items 1 and 2 under the charge of negligence, supra, constituted triable issues."

As a general proposition as to Smith's health, I agree that as a broad proposition if they wanted to say that this man was sick, they forced him to go through or something, when he was sick—that sending a sick man to work might create an issue. On the other hand, I think all of the

testimony in the case was that Smith represented to them that he was all right before the test started. There was a letter that the two union men read saying that he had been cleared to go to work.

I feel either under the evidence or under, I will call it, an estoppel proposition, that is not an issue in the case. I think to say that they could give him some kind of a test but not this test, you simply retry the same issue all over again. It is going to be who has to walk a mile, how far can you see a train. It is just going to be doing indirectly what the Court here said you cannot do.

I think the issues are essentially whether or not the right of way was safe, if there was anything exceptional about the operating conditions, there were a lot of trains running back and forth, for example, or that there was construction work going on here that made this out of the ordinary. I think that is the basic issue in the case. If [fol. 517] there is anything out of the ordinary about Smith's health, I think it could be but I do not think it is in this case.

The Court: Smith's health would be an issue to the extent of determining damages, if any, would it not? We have got the question that this man allegedly suffered from, as they stated here, arthritis and obesity, and he had been, I think, hospitalized for this knee, had he not?

Mr. Sullivan: Yes.

The Court: That was back up at St. Augustine.

Mr. Sullivan: Yes.

The Court: There was some evidence that he was permanently injured and could not work any more. From that standpoint, the question of his previous health comes in.

Mr. Sullivan: I agree.

The Court: Whether it does under your last question—again I am merely trying to interpret this and I want to read it with you and discuss it. It would be my interpretation of Justice Horton's paragraph here, and he has never mentioned it to me and I have never mentioned it to him, that under his paragraph on page 2 the question as to whether or not this employee could be given this test was laid to rest by the District Court and that should not

be an issue when it is retried, with due respect to your problem and position.

Mr. Frates: What do we come down to about the issues [fol. 518] in the case? Actually, I never said anything to Justice Horton about this opinion either, but it seems to me that what they have done is they have taken a shot at me by saying that I tried issues, which would be 1 and 2, and which Your Honor ruled were issues in the case because I argued them. They said that I never said anything about the— I feel very strongly about this case, obviously. I think this is a stupid opinion and I think he just missed the big portion of it. This is a personal attack.

I am not at all sure that the railroad is not entitled to a directed verdict now. Frankly, that is what I would like to get because I am not interested in trying the case. All I want to do is get an opinion so that I can get it to the Supreme Court of the United States. Unfortunately, I think that is a silly proposition that we have in the law. We have got to come back and retry this thing instead of going up on the issue.

The Court: We are here to discuss it and to try to pin it down. I do not know any way or basis, even on the issue that they say that I have—they focus up here on page 3 to say "The real issue in the case, which was apparently forgotten, was whether the appellant provided a reasonably safe place for appellee to work or perform the duties assigned him."

I felt that was a jury question.

[fol. 519] Mr. Sullivan: We pretty much took that position on the appeal.

The Court: I think we got into the gopherberry leaves and becoming entangled in wire that was lying along the track.

Mr. Frates: There were weeds and wires.

The Court: That is where I really believe, Mr. Frates, that it gets down to what you are going to have to stand on under their opinion, and whether or not that is a reasonably safe place to work. If the Court determines or the jury decides there was not anything in there about the situation of the weeds or the grass or the wire, I would be inclined to direct a verdict on reasonably safe place

to work alone, but I do not know how I can do that with this in there.

Mr. Frates: What I am wondering about is this: Actually, I am seriously considering this proposition of not putting any type of evidence in the case—

The Court: If you do not, then I will make it short and I will direct a verdict and we will be finished.

Mr. Frates: Because I do not think that is the real issue in the case. I frankly do not mind that. I think that was just one of the factors in the case. I think the man fell from sheer exhaustion. I think these were things that might have participated in his falling, like the straw that [fol. 520] broke the camel's back. I do not think the straw in itself was of any consequence. I do not think that is so. I think the wire was the thing he ultimately fell on. The same thing would be true with the gopherberry leaves. I think that nobody in normal physical circumstances would have ever fallen on that basis. I do not like to take any rights away from the man.

One of the problems that I have is suppose the jury brings in a verdict and it is a small verdict. We are then precluded from—they say, "Well, you have got a verdict." It is a moot question, this other issue. That is another thing that has me frankly concerned about what to do with this lawsuit.

It looks like I am going to have to probably take a gamble on some of the man's rights to actually get to the basic issue in the case. I actually wish there was some way we could get around it, but I do not know how.

Suppose we go and say that the jury brought in a verdict of $1,500 and the comparative negligence proposition—

The Court: If it is generally agreeable with your client, we would not have to take too much time. We could always, without prejudicing your rights, probably consider, in the interest of your desire to have it further appealed or reviewed, to proffer what you would want to offer again that you offered before and have the Court deny the [fol. 521] proffer, possibly even on a waiver of jury, and not put in what I say or I determined from the reversal is the issue that I can hear or consider on the retrial,

and with your proffer being noted and denied, you are not putting anything on as to the reasonably safe place at the second trial and the Court would enter a directed verdict.

Mr. Frates: That is what I would like to do.

The Court: I will cooperate to that extent. I do not know where it puts you, Mr. Sullivan.

[Discussion off the record.]

Mr. Frates: Judge, I think we are apparently pretty well agreed on what, under this opinion, is the only issue, whether they furnished him a reasonably safe place to work.

Mr. Sullivan: Or exercise reasonable care in furnishing him a safe place. That is just a play on words that we had before.

The Court: Say that again.

Mr. Sullivan: I think that when you look through the cases they say you have to exercise reasonable care and provide a safe place—not an absolute but a reasonably safe place.

Mr. Frates: Using ordinary care in furnishing the employee a reasonably safe place in which to work or perform his duties—ordinary care and furnish him a reasonably safe place to work.

[fol. 522] Mr. Sullivan: I am not quite sure what Mr. Frates wants to proffer.

Mr. Frates: We are going to proffer nothing in the trial. In other words, our whole position in this case is that requiring this fellow to take this test and conduct this thing was the negligence in the case and a violation of FELA. That is negligence in itself. That is common law negligence. That is an issue that we have got to have decided—

The Court: Rather than the trial judge, who has been reversed on it the first time.

Mr. Frates: That is right.

Mr. Sullivan: I want to take Clark's testimony and proffer it or Bomberger's testimony and proffer the whole thing. My feeling would be that maybe you want to ask a question you did not ask the last time and maybe there is a question—

Mr. Frates: My original idea was maybe we could get some issues— In other words, in the ruling it should say that this is proffered for the purpose of the trial and this is denied, and so forth, so we would not even have to do that in the trial. I am not at all sure that I do not want to go on this directed verdict route. I have to think that out first.

I have thought a lot about it, but I have got to allow Smith to make up his mind on this. This is a gamble with [fol. 523] him. Suppose the Supreme Court of the United States refused to grant certiorari and said that the lower court was right? I am willing to take the gamble myself, but I do not know what the railroad has to do, if they can give him this test and exercise a reasonably safe precaution. I do not know whether they have to pick a place where no weeds grow or there is no wire or whatever the thing is. Maybe they are supposed to run up and down and see that it is all right. I think it can get to the absurd point. Maybe a jury will buy it. I think it is ridiculous. If that is all there had been in the lawsuit, I never would have filed it. I think it is an issue. I think there are a lot of things—

The Court: You do not think it is the main issue?

Mr. Frates: I think all of this is of real importance in where it fits into the total picture, his health condition and their knowing it and requiring him to do it. Then it becomes negligence, in my mind, to just go down and say "Here is a test that as a matter of law we can give. Here, Joe Doaks, you run up and down this main line to see if you can do it."

I just do not want to spend two or three days wrestling with the transcript or objections and taking each one of these things up all the time. I do not know what suggestions to offer Your Honor to go on from here on the thing. Maybe I could submit a pretrial proposed order or a pre-[fol. 524] trial motion on what the issues would be.

The Court: I think we can boil it down to the question of whether or not the railroad provided or used ordinary— I think you used the word reasonable care—in providing a reasonably safe place for the employee to work or per-

form the work or perform the duties assigned him. I think that is the question.

You might note that I determined in the pretrial order or ruled that they had a right to give him the test.

[Discussion off the record.]

The Court: With the determination that I made here with the last statement in the record, do either of you want to go any further or perhaps you have to make up your minds before we do or do we have any need with that issue being the one that we are going to consider at the trial that was set up for Monday as to any further disposition between you as to witnesses or documents or items in evidence that we had before that can be admitted without objection? I do not know whether we had photographs of this track or—

Mr. Sullivan: Yes. There were some rules or rule books. There were some X-rays, and that's about all.

The Court: I do not want to waste your time if you think that is not something that either of you would need or which would greatly assist you. I think it is particularly [fol. 525] the decision right now of Mr. Frates as to how he wants to proceed in the light of the ruling of the Court or the Court's interpretation of this reversal.

Mr. Frates: Of course, that is the first thing I had to know. Some judges say that they do not care what was said. I do not agree with them. We are going to try it just this way. If Your Honor were inclined to do that, I would go right along with you.

[Discussion off the record.]

Mr. Sullivan: To state our position—I have not checked out the federal appellate procedure and Mr. Frates is probably right—I just do not know, but I do not want to be by my silence agreeing to anything there. I would assume from the Court's opinion here is that the issues would be items 3 through 8 that they have set out in the opinion.

The Court: He did not exclude those, but he sure makes them—

Mr. Frates: Let us take 7 and 8, failure to provide proper equipment and safeguards in the performance of duties and participation in a field test.

The Court: I do not think there was any evidence as to equipment or safeguards.

Mr. Frates: You could say, did you have this man examined by the doctor? That is a safeguard in giving this [fol. 526] test, particularly knowing, and which was obvious from just looking at him, his physical condition, whether he could—I do not think they mean that, however, they have not ruled that out.

I think what they mean, or whoever wrote this thing, is the real issue in the case whether the railroad furnished a reasonably safe place for him to work.

Mr. Sullivan: I think in sweeping terms that is true. They are saying there may be certain corollaries that stem from that basic proposition.

The Court: It is going to have to be around that ordinary or reasonable care that is required of the railroad in that relationship to be a part of it if I retried it.

Mr. Frates: Actually, if we were going to say the issues are 3, 4, 5, 6, 7 and 8, under 7 I would certainly attempt and proffer because I think it would be proper under this allegation, although I do not think they would intend for it to be in view of this opinion—

Mr. Sullivan: I agree with that. I think maybe they are saying—

The Court: I agree with Mr. Frates as to the way it could be argued. Again, I would indicate on your proffer that I would deny it.

Mr. Frates: That is why I think the issue would be [fol. 527] in question—

Mr. Sullivan: My only question would be if we could get some indication enough in advance of the trial to know which way it is going to go. I do not want to go through a transcript of all these witnesses if I do not have to.

The Court: I am sure Mr. Frates' time is valuable enough and he does not want to use it unnecessarily. I have already indicated my ruling on these matters and I will reduce it to writing at the request of either of you.

Mr. Frates: I would also like to get it in where it says here, "If the appellee were aggrieved, he had a remedy

for such grievance under the Railway Labor Act." If that is their position, I would like to get into that, get that into the pretrial order. That is what they have said here.

The Court: "If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U.S.C., Paragraph 151."

Mr. Frates: That would save a lot of time of us going in and arguing the law or debating that because we went into that.

Mr. Sullivan: I certainly do not intend to take any position contrary to what we have taken before. I am not entirely clear what I am being asked to agree on.

Mr. Frates: Not anything, but I want in a pretrial order, [fol. 528] to which we are going to be bound—I would like to have a Court statement that in the opinion of the Court I am bound by this opinion that says that a grievance for—just the language in here, which says, "If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act," and that is the law of the case.

Mr. Sullivan: It is agreed that Judge Pearson can put in the order that the Appellate Court said so and so and I am bound by it.

The Court: I do not know enough about the Railway Labor Act without looking at it, but I would sure enter in my order that I would sustain an objection to any testimony offered or proffered which had to do with the grievance of the employee as to the propriety or right of being given this particular test on the basis of this opinion.

Mr. Frates: I think I can draft one up pretty quickly.

The Court: I believe you are first up. In the interest of my time, which I am basically more concerned about than I am of Mr. Sullivan's time, who reduced my box score here—

Mr. Sullivan: Not by much.

[Discussion off the record.]

Mr. Sullivan: I want to advise Mr. Frates that I am [fol. 529] not quite sure where I stand.

Mr. Frates: I am going to submit a proposed or probably a proposed pretrial order. I will try to get it in the next day or two. It will be an order on pretrial dealing

with this issue. I will give you a copy of it and we can agree on the thing.

The Court: I think what he is partly asking you, Mr. Frates, if you decide on your definite procedure of going ahead, it would be helpful to the Court because I have nine other cases set—

Mr. Frates: If I try the case, it looks like the only thing under the opinion, under the Judge's interpretation of the opinion—which I think is correct and I think you are still right, Judge—is that there was a wire and gopher-berry leaves and it was a violation of the Florida Railroad Commission bulletin that I put in, and the medical evidence. That is all there is to the case under the issues—

Mr. Sullivan: I appreciate that you cannot say now what you are—

Mr. Frates: That is the most I am going to do. That is the maximum that I would do. That would require nothing but Smith's testimony and the bulletin and the medical testimony. Maybe we can stipulate on the medical.

Mr. Sullivan: If I ever get some word out of Holmes. [fol. 530] He is going to look at him again. I pressed him for something.

The Court: If we could stipulate to have some of the medical testimony which would not be objected to, if this does not prejudice Smith's right, used from the old record or something, we could save a lot of time and effort.

Mr. Frates: I think we could stipulate. I do not think there is any question that all the doctors feel he is permanently injured as a result of his arthritis and they thought this aggravated it. I think Holmes ultimately came out with that same opinion. I do not suppose he would stipulate to that.

Mr. Sullivan: No.

Mr. Frates: We will go ahead with the medical.

[Whereupon, the pretrial conference was concluded.]

[fol. 531] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 532]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
AT LAW

No. 38384

BERT SMITH, Plaintiff,

v.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III, as Trustees of the Property of the FLORIDA EAST COAST RAILWAY COMPANY, a Florida corporation, Defendants.

Stenographic Transcript of Minutes of Retrial of Case—Monday, May 11, 1959

Miami, Florida

The above-entitled case came on for trial before the Hon. Ray Pearson, Judge of the above-styled court, and a jury, at the Courthouse, Miami, Florida, on Monday, May 11, 1959, at 9:30 o'clock a.m., pursuant to notice.

APPEARANCES:

William S. Frates, Sam Daniels, and William M. Hicks, Esqs., of the firm of Nichols, Gaither, Green, Frates & Beckham, on behalf of the Plaintiff.

Dwight Sullivan, Esq., of the firm of Scott, McCarthy, Preston, Steel & Gilleland, on behalf of the Defendants.

[fol. 533] (The following proceedings were had out of the presence of the veniremen:)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Frates: Your Honor, I think that this is a question —as Stanley very aptly puts it—they have got to fish or cut bait. If he will stipulate that this is an issue under this

condition, Bert Smith's condition, and they are giving him the test and knowing his condition, and if that is an issue in this case, all those factors, then I want to try the lawsuit.

It is my understanding of the pretrial that it wasn't and that it was precluded and that the Court said they had a right to give him the test, and they have all the facts. There are not going to be any different facts, and we wanted to proffer the record as it is.

Now, if there is any doubt in his mind that that is an issue, I would like to have him say that is an issue and we will stipulate and try the lawsuit.

Mr. Sullivan: Your Honor, our position was and has been that the right to give the test or not—that he can't question that. In other words, whether the test was reasonable or whether the rules of the railroad are valid, whether they are good rules or bad rules, that isn't something that comes up under the FELA.

If the evidence should show that this man was so infirm that he was feeble and sick and they said, "Go to work or [fol. 534] else," I think that could be an issue. I think what the Court of Appeals ruled out and said was error was to insert into the case the right to give these tests, whether the rules were good or bad rules, whether they were out to get him, I think that is what they said was not in. That is allegations 1 and 2 under the pleadings.

The Court: Do you have the opinion here?

Mr. Frates: Yes, sir. Well, Judge, I frankly want to try this case on that issue, that is what I think, if Mr. Sullivan wants to stipulate that that is the issue.

Mr. Sullivan: I don't stipulate that it is. I say if they want to amend and make that an issue, I think it could be, your Honor. I think the proofs so far justify it, but if they want to travel on that issue, I think they could amend.

The Court: If you don't amend, and stand on this opinion, I think the Court has made it pretty clear what the one issue is there, but it is a question of interpretation of whether—

Mr. Frates: Now, "requiring the appellee to participate in a field test, allowing the appellant to conduct a field test," I think under that they are broad enough to say, "require Bert Smith to participate in this field test." Now, I want

to make sure so that neither one of us gets boxed in. I don't want Dwight to get boxed in in the thing, and I don't [fol. 535] want to get boxed in.

Now, I think that the amendment that I ask is covered in those, 1 and 2, but I don't want there to be any question about it; and if that is an issue, if he is not content, and that is an issue, I am ready to try the lawsuit.

Mr. Sullivan: I say, what is the issue, your Honor?

The Court: My understanding of your amendment is that if you amend, you are standing on the testimony that was offered before, so that issue—

Mr. Frates: Yes, sir; no change in the testimony at all.

The Court: Well, it would be my impression—and we are talking about it now outside of the presence of the jury—that permitting him to amend, that under the testimony that was adduced before on this point, that I would rule that there was no proper issue of evidence to submit to the jury of negligence on requiring him to take this particular field test under the testimony.

Mr. Sullivan: You mean on the question of his health?

The Court: Yes.

Mr. Sullivan: Well, I think I agree with that, your Honor. In terms of a proffer, I don't know that our testimony would be any different, with this one exception: That we might [fol. 536] add to a proffer that he told Clark that he felt fine that morning, but I think generally the evidence was that he had a back-to-work slip, and in the letter they read before the test started, they said the doctors cleared him, "He is okay to work."

Mr. Frates: Your Honor, it seems to me that Dwight doesn't want to go on either side of the fence, and that he wants—

Mr. Sullivan: That isn't so, your Honor.

Mr. Frates: —and that he wants to protect himself on an appeal. Now, if your Honor permits the amendment and has ruled then I think that issue is finished. We don't want to come up on an appeal and be right back arguing this thing and getting into a question, "This was an issue, this was not an issue, and this was an issue." I want the thing sharply drawn, as I think this opinion has cut it sharply, and that is why we want to go on this issue and why

we have stayed away from the other six counts, or the six paragraphs, so that we can get a sharp issue and we won't have this running around and indecision.

Now, it doesn't seem to me that—of course, if your Honor has ruled, then I think that has taken care of the situation.

The Court: I think that is the way it should be. I think that under No. 1, requiring the appellee to participate in a [fol. 539] field test, where they state in their opinion that they do not consider items 1 and 2 under the charge of negligence to constitute triable issue. Now, I understand that he is standing on the testimony that he offered at the last trial.

Mr. Frates: Yes, sir.

The Court: As to that issue and on that same testimony and this ruling of the Court, I would say that that would not be an issue that I would submit to go to them.

Mr. Sullivan: Let me see if your Honor—

The Court: If it is the same testimony and same issues as to the physical health in taking this test.

Mr. Sullivan: Well, our basic objection was that whether or not the railroad officials have the right to take an employee and say, "You have got to take the test," that isn't an issue under the FELA.

The Court: That is no issue here.

Mr. Sullivan: That was our contention.

The Court: All right.

Mr. Sullivan: Now, I think as an abstract proposition under the FELA, or possibly on a common law basis, if an employee is so sick and infirm that he is unable to work and they say, "Go to work or else," I think that can be an issue. I don't think it was under the testimony in this case.

The Court: That is what I understood, they were stand- [fol. 538] ing on the same testimony offered; and I agree with you, I don't think it is either, on that testimony. There may be a situation where it could be, but under this testimony I will rule now that it would not be, and I think that the District Court had that issue as one of the matters before it and ruled out No. 1.

I think that I am inclined to agree with Mr. Frates that they just didn't say requiring a field test was improper. They said, "requiring the appellee to participate in a field

test," and they had the field test that was conducted when they wrote this opinion, and if their opinion means anything to us at all, I think we have got to follow it to the extent of our interpretation of their words and what they meant.

Mr. Frates: Yes, sir.

The Court: And I think again, to direct the trial court, I think the judge writing the opinion stated it pretty clearly when he said the real issue in the case which was apparently forgotten was whether the appellant provided a reasonably safe place for the appellee to work or perform the duties assigned him, and I think we agreed that they had to exercise ordinary or reasonable care in providing such a safe place to work, and that was going to be the issue they were going to try.

Mr. Sullivan: As elaborated by Allegations 3 through [fol. 539] 8, your Honor.

The Court: That's right; and I don't think this amendment, if it comes under one of these, I definitely say it comes under 1 and not 3 through 8.

Mr. Frates: I think so, too.

Mr. Sullivan: It could be a separate one, for that matter.

The Court: My ruling is it would be included in No. 1, it would be a modification of 1.

Mr. Frates: Yes, sir.

Mr. Sullivan: Now, your Honor, as to the proffer, again, until 15 minutes ago I wasn't quite sure what turn this was going to take.

The Court: I understand that.

Mr. Sullivan: I don't know, and frankly this was something I thought about if it should take this turn, am I entitled where a proffer was going to be ruled out, to cross examine and possibly ask a question I didn't ask last time? I don't think a proffer is that I simply proffer all the testimony of last time. I think as long as it is a new trial, we draw up a stipulation of facts, or we have a new proffer, one or the other.

Mr. Frates: In line with that, I want to proffer this record which has gone up anyway, I mean, this is what is going up, the record in the original trial is what is going up

[fol. 540] to the Supreme Court of the United States anyway.

Now, I have no objection and I will stipulate with Dwight on anything that he might want to add. When I say "anything," anything within reason in the way of cross examination that he might want to add to this thing that he would adduce on the stand, and we can draw it up. I don't know what he has in mind.

Mr. Sullivan: I am thinking this, your Honor, that simply to say, "I take all the testimony we had before and proffer it as if the witness were here," I don't think that is a proper form of proffer in the absence of a stipulation.

Mr. Frates: You can do that under the rule anyway. You can offer any evidence taken in the previous trial under Statutes, and I don't think it makes any difference whether Mr. Sullivan approves of it or not. That is what the Statute permits. Your Honor, on these issues, would rule that portion of it out. I think that would naturally follow that portion of it out. That wasn't applicable to these three points, and the Court has said none of it is applicable to that, so we have got a record with the exception of the medical, and I don't think that is any real issue here on the thing, that your Honor has ruled that none of the evidence other than some innocuous statements such as, "What is your name," and "Where do you work," because it is immaterial under these three issues.

[fol. 541] Mr. Sullivan: Your Honor, all of this testimony went to both issues. Almost every witness was asked, "What happened on the test, what was the condition of the right-of-way, who walked fastest, who tripped, who didn't trip." Then, "Did you ever give anyone else a test, do you have a right to give Bert Smith a test."

So to say on the one hand that, "I proffer all of this testimony," I think you have got to go through it and say which testimony you are proffering, because as I understand it, they are not traveling now on Allegations 3 through 8, but only 1 and 2; and I think to proffer all of the testimony in order to force your Honor to direct a verdict and say all of this made a jury issue on these other items where something is mixed and perhaps confuses the

record, I think we ought to be pretty clear as to what we proffer on this.

Mr. Frates: I don't think Mr. Sullivan has any choice. I assume these are official proceedings, and we proffer our record, the testimony of these various witnesses in this case, as we can do under the Statute. That is exactly what I am doing now; and your Honor, as I interpret the opinion, would have to rule with the exception of the medical—which I don't think there is any question or any quarrel about—we are talking about the liability aspect of it—your Honor would have to rule that that is not an issue to go to [fol. 542] the jury, because there can be no issues under this opinion to go to the jury, and that is why you have to direct a verdict. So I don't know what he is talking about. I don't quite understand what point he is trying, because we have narrowed this thing down, as far as I can see it, to whether or not this Court is right in that opinion in these first three things.

The Court: All right. The thing that I am trying to understand in your proffer, there was some testimony adduced in the first trial which I thought went to the question of the point as to providing a reasonably safe place to work. I think you mentioned that they mentioned in there something which they said which was apparently forgotten; but I mentioned at our pretrial conference that I thought the question as to the wire on the right-of-way and the governor (sic) berry leaves, or the slippery condition or permitting the weeds to grow were questions which might go to the reasonably safe place to work.

Mr. Frates: All right, sir.

Mr. Sullivan: We took that position on the appeal, your Honor.

Mr. Frates: That is true. Now, that is not an issue in this case, because we are not relying on any of those counts, on a reasonably safe place to work.

The Court: I see.

[fol. 543] Mr. Frates: Because we are relying on the three issues that the Court— Let's put it this way; We are not relying on the other issues which they set up. We are relying on the first two and the amendment to that.

The Court: I see. Otherwise you want to proceed to trial on No. 1, requiring Bert Smith to participate in a field test; 2, allowing the agents of the railroad to conduct the field test; and 3—which is your amendment—which is requiring Bert Smith, knowing his physical condition, to take the field test.

Mr. Frates: Yes, sir.

The Court: If he wants to travel only on those three and proffer this testimony then I don't follow your problem right off, Mr. Sullivan. I think that he is raising—excuse me, I don't mean to use that term—but he is merely putting it here to get something the Court has already ruled on so he can go ahead.

Mr. Sullivan: I will agree that that simplifies the problem. It simplifies it greatly.

The Court: I don't see how I can help but agree with the simplification, because I think in my interpretation he is not traveling under anything that I will permit anything on, so he is just merely proffering that record. I will note the proffer, deny it, note that he doesn't desire to offer any additional testimony on the items which I say the appellate [fol. 544] court has made our triable issue, and that he advises me that he is not traveling on a reasonably safe place to work, and which I said there is some testimony in there regarding it which might prohibit me from directing a verdict, but on his advice to me he is not traveling or presenting his case on that, I will direct a verdict and we are finished here.

Mr. Sullivan: Well, the only question then that remains, your Honor—as I say, that simplifies it greatly—is the form of the proffer. Now, I may be incorrect, but I don't think I am at the moment, I don't think you can just take a lot of testimony and say, "I proffer this the same way." Let me note an objection to the form of the proffer.

The Court: Mr. Hicks, do you know what the Statute is on the proffer?

Mr. Hicks: No, I don't.

The Court: I thought we might get it and look at it here together.

Mr. Daniels: It is not a Statute. It is the Rules of Civil Procedure. It is Rule Forty-one point—

Mr. Frates: Isn't that a statute too, Sam, that says in any trial you can introduce—

Mr. Daniels: Well, that is former testimony, talking about former testimony in a proffer.

Mr. Sullivan: Under certain circumstances.

[fol. 545] Mr. Daniels: The former testimony is Chapter 90, FSA.

Mr. Frates: That's right. This is what this is, former testimony in any trial, and that is exactly what I am proffering.

The Court: There is no limitation on offering that.

Mr. Frates: Yes, sir.

Mr. Sullivan: Let me note my disagreement with that.

The Court: Will you bring Volume 90—what is it?

Mr. Daniels: It is Volume 1 of Unannotated.

I will be frank, there is only one part of this that concerns me, and that is I don't want the railroad to be in a position to object to your ruling when we go out to the District Court again. I want them to take the position they either object to the testimony we are proffering or they don't object to it. If they object to it and your Honor sustains them, then we have no question on the appeal; but we are basically giving them their choice. We want to prove that the railroad either knew or should have known that Bert Smith was physically unable to take that test and likely to be injured if he took it, and in spite of what the railroad knew or should have known, they gave him the test. That is one theory.

[fol. 546] Now, they either object to our theory and our evidence, or they don't, and I don't know—

Mr. Frates: Well, I think it is not whether they object or not, your Honor. Your Honor has ruled that we can't show that under this opinion.

The Court: Yes, I see what you want. He wanted to go a little further and see if Dwight would keep from making an issue that he agreed with the Court on, but you have already got my determination on it.

Mr. Daniels: I understand all that, but this is a very unusual situation where the plaintiff is trying to get a directed verdict against them and the railroad is trying to

keep as many irons in the fire as possible, and what I don't want is the Court left in the middle.

Mr. Sullivan: Your Honor, let me say that I can appreciate that they haven't known until recently what they wanted to do, but as late as Friday I called and said, "Have you decided," so they come down here and say, "Fish or cut bait, Sullivan," and this is absolutely new to me at this moment, because I didn't know it until Friday afternoon.

Mr. Frates: We are not asking the Judge to fish or cut bait, but what Sam doesn't want is for us to go out there and come back and have them reverse this thing here, because that is not going to solve anything anyway. We would be back and going again, and I told Dwight we are [fol. 547] trying to—as fairly as we can, to him and to ourselves, get the real issue that I think this opinion covers and present it to the Supreme Court of the United States without trying to trap him or trap us, and I think that is what Dwight is a little concerned about.

Mr. Daniels: I think we are within our rights before we get this thing ultimately concluded and a verdict directed to have the railroad take the position they either want to have us prove it or they don't, and if they want to have us prove it, we are ready to go to trial on it.

The Court: I don't think this is right on point, Sam, of what we have here today.

Mr. Daniels: Not on the former testimony, no.

The Court: He was referring to this one where you proffer something and the judge excludes it and then you have a right to show in the record what you would have proved if the witness had been permitted to answer a question; but I think our situation here is a little different.

Mr. Frates: Well, your Honor, that has some exceptions here, but again, I don't think that Dwight would hesitate to stipulate on this, because it says here:

> "Such evidence has at such former trial been reported stenographically or reduced to writing in the presence of the Court; that the party against whom the evidence [fol. 548] is offered, or his privy, was a party on the former trial; that the issue is substantially the same in both cases; that a substantial reason is shown why the original witness or document is not produced; that

the Court is satisfied that the report of such evidence taken at such former trial is a correct report."

Now, the only one I think that would be of any question is that a substantial reason is shown why the original witness or document is not produced, and again, we could go through each one of these and your Honor would just have to say, "I refuse that testimony," and again I think that is just taking up the Court's time and our time and not really solving anybody's problem.

Mr. Sullivan: Your Honor, I feel this: I don't think the statute does cover a proffer of this kind. I think that is when a witness is unavailable or when it is a different trial, the circumstances under which you can use prior reported testimony.

Now, I think we are basically in agreement as to what the issues are here. Perhaps we could draw up a stipulation of facts and work on that rather than taking testimony all over again, but inasmuch as they have made an amendment here this morning, I don't want that record to stand for all of the testimony.

[fol. 549] Mr. Frates: Well, what do you want additionally? In other words, what additional evidence do you want? I might stipulate with you on that. This is going in anyway. I mean we are talking about something that I don't think makes a bit of difference, because this is going to be part of this record, and no matter what we stipulate or agree on, this is going to be the record that is going to be appealed.

If there is anything, that is, any evidence, that Dwight wants to add or that is reasonable, we can stipulate on the thing.

Mr. Sullivan: Well, I think perhaps we can, your Honor. I can tell you in part now, there are a couple of questions I would probably want to ask Clark, but there may be something else. Now, perhaps the best way to do it is to proceed on a stipulation of facts as to what they would present in the case.

The Court: I am convinced under that statute that you can't offer the entire record in, to proffer it unless it is by agreement with Sullivan, under that statute. Now, why do

you need, Mr. Frates, to make this record a part of this trial here? You have already got it as a part of the other one.

Mr. Daniels: I believe I can answer that, your Honor.

The Court: I was just thinking if you didn't have to [fol. 550] have it, all you would do is announce to me that all you desired to offer testimony on is Points 1, 2, and 3, and then in the record have the Court say, "I am not going to hear any testimony on 1, 2, and 3," and then say, "I rest."

Mr. Daniels: It is a procedural problem.

Mr. Frates: That is all.

Mr. Daniels: The reason you are afforded a chance to make a proffer is that when you go up on appeal if we don't have the proffered evidence before the appellate court, you can't get a review of the propriety of excluding the evidence or of directing a verdict, because what we could have shown is not in the record. That is why we need that, but we could do this to solve Mr. Sullivan's problem—

The Court: Would this case be going up today or on the one already finished?

Mr. Frates: Both.

Mr. Daniels: Actually, this is the real procedural gimmick back of it. We could not go to Washington from the District Court's former opinion because there was no final judgment, and you could only get review in Washington by final judgment; so on remand, our problem is to get a final judgment that will allow a review of what action was taken in the first opinion.

Now, we could stipulate with Mr. Sullivan in regard to what he offers to prove by proffer that we won't have any [fol. 551] problem with letting him put in anything he wanted to.

Would we, Bill?

Mr. Frates: No. Your Honor, probably I was the one who caused the confusion. I think the statute deals actually with introduction into evidence. I think we come in here, stand on this, we proffer, your Honor says, "I am not going to hear any evidence on that." We say, "Your Honor, here is what we proffer instead of bringing witnesses in which you are not going to hear because you say it is immaterial on this issue," so we are not proffering in evidence. We are

proffering to make a record, and your Honor excludes it under these issues, and I think procedurally that would be a why that we could get around it.

I think Dwight is, out of an abundance of caution—we don't want to go out and come back here. We want these first two things decided; and I don't know how to reassure him any more than we have, and whatever other evidence he wants to put in, I am sure that we will agree to whatever evidence he wants to pull out by Clark or any of these men, but I think we can proffer this.

In other words, I don't think there is anything since we have come in and announced this, your Honor says, "I am not going to hear any evidence," we say, "Your Honor, we proffer this evidence." Your Honor says, "Any of it [fol. 552] that is not on these issues would be immaterial, so I rule that out. Any of it that is on these issues, the Court has ruled that it is not admissible, so I rule that it is not admissible evidence," so I think we are over that.

Mr. Sullivan: Your Honor, I don't see why working out a stipulation of facts won't solve the problem. I don't think the evidence they proffer under the Court's ruling is admissible. I don't think the form of the proffer is correct.

Now, I think certainly instead of getting the witnesses in and hearing a lot of testimony which you would rule out, I think we can very well proceed on a stipulation of facts as to what the proffer would be and what the witnesses will testify to.

Mr. Frates: Dwight, the only concern I have on a stipulation of facts is that we walk out of here and we start hedging on commas. I just don't see where you have any reservation about this, and I am convinced that it is a discretionary matter with your Honor, when we say, "Here is the evidence we are going to proffer," and your Honor says, "I am not going to hear it." I could stand up here and a proffer would be my stating in the record what we are going to prove or what we intend to prove. That can be a proffer. You don't have to put a witness on. Now, I agree that if he wanted to cross examine he would have the right, and I don't want to preclude him from cross exam-

[fol. 553] ining or asking any additional facts, and I will agree that he can do that.

The Court: Well, that is the point we seem to be hung on right now, is his desire possibly to see the witness and to ask these additional questions.

Mr. Frates: Well, they are his own witnesses, and what he wants to adduce, whatever it is, we will just put it in the record.

Mr. Daniels: As a matter of fact, we won't make you call any witness or anything. We will accept as true, for the purpose of this record, your statement of anything you can prove, and you can add anything you want.

Mr. Frates: That's right.

Mr. Sullivan: Well, why the objections to stipulating as to what the proffer would be?

Mr. Daniels: Because I am not sure that you can stipulate all the inferences in testimony. You had no hesitancy in asking for a directed verdict on their testimony before, or an elimination of the issues, that that testimony did not raise it; and that is the best evidence of what it is.

I don't think our trying to agree with you as to what that says is anywhere near as good as what it is.

Mr. Sullivan: What they are saying in effect, your Honor, is that they want me to stipulate that it is a proper form of proffer, and I don't think it is.

[fol. 554] Mr. Frates: I don't want you to stipulate to anything on the thing. I think it is a question of we proffer this to your Honor as to what the evidence in this case would be, that is all. Your Honor just says, "I refuse to accept it," and I don't think Mr. Sullivan can object to it.

The Court: Well, that is the point we are at right now. I have already indicated that if you proffer it I won't receive it. The only question you have got now is you going up to the District Court and Mr. Sullivan may advise the District Court—which he certainly has a right to do if he is right—that the proffer was improper and couldn't have even been considered by the Court; and the District Court out there sends you back here, and that is what we are trying to get away from.

Mr. Frates: That's right, and we don't want that to happen, but I don't see where we get by that other than

just a further delay. If he is right, and if they are right in this position, we ought to end this litigation. If we are right, we ought to end it, too, and we ought not to drag it out.

The Court: Under Mr. Frates' position, all he wants to do, in a sense, as I understand it, is stand on practically what he has before. He thinks the District Court is wrong, and under this present status of sending it back, [fol. 555] they can't go any further than the District Court until we do something here; so my disposition as to my appellate court, whether I agree with them all the time or not, is to say that they were right and let him go ahead and see if they were right or wrong.

Mr. Sullivan: Well, in broad terms, I can't disagree with your Honor, but when it comes down to my saying that is a proper form of proffer, that is the nub of it at the moment.

The Court: Well, Mr. Sullivan is not going to agree with your proffer, but if you want to offer it, I will refuse it and we will go ahead, then, and see where we stand.

Mr. Sullivan: Let me note that I am objecting to it.

The Court: All right. I think that is your right, and I don't want to curb that position.

Mr. Sullivan: I am objecting to it for both reasons.

The Court: Do you want a jury? Why don't you waive a jury and let me direct a verdict?

Mr. Daniels: You have real problems now.

Mr. Frates: On the proffer?

Mr. Daniels: If your proffer is rejected, I mean you can't get the railroad to take the position is your problem.

[fol. 556] Mr. Frates: That's right, they don't want to do anything about it. They don't want to agree with it and they don't want to disagree with it, so actually what it looks like we better do, is we had better try this case and bring all this evidence in and let your Honor listen to it out of the presence of the jury because I am going to call the same witnesses and read them the same questions verbatim.

The Court: You don't have an extra copy of the record for me, do you? I could follow it a little better.

All right. Let's take a couple of minutes and let's get our jury in and go ahead.

Mr. Daniels: You don't need a jury, because all of this will be done out of the presence of the jury.

The Court: Mr. Frates said he wanted a jury.

Mr. Frates: Only on the directed verdict.

Mr. Daniels: Because this is all a proffer. What we have got to do is bring the witnesses before your Honor. The proffer has to be made out of the presence of the jury because there is no issue for them to determine.

The Court: We had better select one, hadn't we, and excuse them while you make your proffer?

Mr. Daniels: That would require them to remain in attendance for two or three days.

Mr. Frates: We are just going to take two or three days. [fol. 557] The Court: I will send them home for the rest of the day while we work.

Mr. Frates; The only question in my mind now is whether we have these witnesses.

Mr. Daniels: Haven't we got two questions to start out with? Now, maybe Mr. Sullivan is going the other way now, but let me put this question to counsel for the railroad: If we offer testimony that Mr. Smith was physically unable to take the test and that your railroad knew or should have known that he was physically unable to take the test, and that if he took the test it was likely to result in physical harm to him, are you going to object to that testimony or not?

Mr. Sullivan: I would say my answer to that, your Honor, is on the record there. I would say that they have a right to present the testimony, but they don't make an issue of fact on it.

Mr. Frates: But would you object to it?

Mr. Daniels: Do you want the jury to hear it but not consider it?

Mr. Sullivan: No, I would say that that would not make an issue of fact.

Mr. Frates: If it doesn't make an issue of fact, it is not for the jury to consider. If it is immaterial your Honor would have no right to let it go to a jury.

[fol. 558] Mr. Sullivan: Your Honor, they might put on a case that would amount to nothing, although theoretically

they have a right to try to create an issue of fact on it. The testimony at the last trial—

Mr. Frates: He wants to object to it. He wants to appeal. He doesn't want to really get down to the issue on the thing.

Well, is Clark here? Have you got him?

Mr. Sullivan: Yes, he is in town.

Mr. Frates: The only thing I can do, your Honor, as to Lockwood and Morgan and Bomberger—Lockwood is not here, Morgan is the doctor, we can just take their testimony. That is immaterial, but Clark and Bomberger—

Mr. Sullivan: Your Honor, I am not trying to be hard-nosed about this, but we can certainly try to work out a stipulation on it, and I would say if we don't get anywhere on that, to come back and make this proffer. I don't see why there should be this great impatience because this has come up this morning. It hasn't come up before that.

Mr. Frates: We talked about it on the pretrial. I didn't give you the final answer on it because I couldn't. The only thing we don't want, we don't want him to go out here and say, "You can't put this evidence in, you can't proffer this evidence that way."

Now, this is a fine kettle of fish. If we are trying to [fol. 559] resolve this thing, that is a purely technical ground. It is going to make all of us work here a couple of days just to get in the record what is already here in the record. We have agreed that anything he wants to bring in—I am not so sure that we won't have the right to put it in. I don't want to take that chance, I don't want to go out here and then come back here and say, "Well, you have to read this or you have to have the witnesses or that wasn't a proper proffer."

I mean, it just seems to me silly, and I don't know his objective. I can't understand what his objective is or why he is objecting to this and I have told him that anything he wants to add into this record, we will stipulate on.

The Court: I understand what you are offering and I understand he is objecting to it, and I have already indicated to you what I would rule. Now, that is just about as far as I know how to go at this stage with you.

Mr. Frates: Well, I have officially proffered the testimony of these prior witnesses.

Mr. Daniels: Your Honor, could I be heard on the question of whether that proffer is in proper form?

The Court: Are you trying to convince me or Mr. Sullivan?

Mr. Daniels: I am addressing my remarks to your Honor. [fol. 560] Mr. Frates: Your Honor has accepted it, as I understand.

The Court: Yes.

Mr. Daniels: Maybe I didn't understand. I thought you held that we could not proffer it.

The Court: No, I let you proffer it and I just excluded the proffer.

Mr. Daniels: Oh, you accept it as a proper proffer, but you hold that it is inadmissible?

The Court: That's right.

Mr. Daniels: We have no problems then.

Mr. Frates: Let's go and we will let him raise that out there and we might be back to see your Honor.

Mr. Daniels: But with the understanding that he, by our admission and stipulation, can add anything to that that he desires in the statement of what he expects to prove and we will accept as true that which he states he can prove.

The Court: He has also objected to your form of proffer.

Mr. Daniels: We have no problems here.

The Court: Do you want a jury?

Mr. Frates: Yes, sir, I would like to have a jury and just take six men and have you direct them to bring in a [fol. 561] verdict for the railroad in this case. I think we have to do that.

Mr. Sullivan: Your Honor, one last question. I am always accused of quibbling, but if there is anything we should want to add, without waiving our two basic objections, can we consider it as being added now and get the jury in and out?

The Court: My understanding of what Mr. Daniels said is that is correct.

Mr. Sullivan: I can submit it to them in written form afterwards, and that would be accepted?

The Court: That's right.

Mr. Frates: That's correct.

(Thereupon the veniremen returned to the courtroom and the following proceedings were had:)

The Court: Mr. Clerk, call the first six jurors on your list to the jury box, please.

The Clerk: Harry Warren, William J. Grady, Henry N. Wheeler, Joseph L. Caplano, Jr., Eddie Bryant, Jr., LaVerne F. Bailey.

NOTE RE SUBSTITUTION OF DEFENDANT TRUSTEES

The Court: Mr. Sullivan, do you want to note in the record the corrected name of the defendant trustees?

Mr. Sullivan: Yes, sir. I think it is as indicated on the opinion here, your Honor.

[fol. 562] The Court: This is the case of Bert Smith, plaintiff, versus J. Turner Butler and William A. Hallowes, III, as Trustees of the Property of the Florida East Coast Railway Company, a Florida corporation, defendants.

Mr. Frates: We accept the jury, your Honor.

Mr. Sullivan: We accept the jury, your Honor.

The Court: Would you swear the jury, Mr. Clerk, these first six men?

(Thereupon the jury was sworn.)

Mr. Frates: Your Honor, I wonder if the statements that were recorded could be part of the record so that your Honor wouldn't have to go through the procedure here and state our position as to what we are proving, the counts and the proving of it.

Mr. Sullivan: Can we take the whole thing and incorporate it as having been said now?

The Court: You have no objection to the statements made outside of the presence of the jury as the positions of the Court and the parties going in at this time?

Mr. Sullivan: Yes, sir, objections and rulings and all the rest.

The Court: On the Court's earlier ruling, Mr. Frates, do you have any further testimony to offer to the Court at this time?

Mr. Frates: No, we have not, your Honor.

[fol. 563] ORDER FOR DIRECTED VERDICT

The Court: The Court, noting your right as to the questions, subject to your objections to the proffer, to add any other facts that you desire, at this time in the record of my own motion, the Court will direct a verdict of not guilty as to the defendants and will direct the trial jury who have been sworn to return such directed verdict of not guilty in open court.

Mr. Bailiff, will you tender this form of verdict to Mr. Warren, the first juror in the box, and direct him on behalf of the trial jury on my instructions to enter this directed verdict of not guilty as to the defendant railroad?

Mr. Clerk, will you publish the verdict in open court into the record?

The Clerk: (Reading) "In Circuit Court, Dade County, Florida, No. 38384. Bert Smith, plaintiff, versus J. Turner Butler and William A. Hallowes, III, Trustees of the Property of the Florida East Coast Railway Company, a Florida corporation, defendants. Verdict: We, the Jury, find the defendant not guilty. So say we all. Harry W. Warren, Foreman. Dated May 11, 1959."

The Court: The verdict having been published in open court on the direction of the Court following the considerations which were made a part of this record, there being no testimony adduced as to the issues that the Court said was [fol. 564] a triable issue, the Court will record this directed verdict in the record and will discharge the parties at this time subject to further post-trial motions or matters, and will consider the motion of the defendant for entry of a final judgment on this directed verdict.

Is there anything further?

Mr. Frates: No, sir.

Thank you very much, your Honor, for your very kind attention and indulgence on this matter.

(Thereupon the trial was concluded.)

[fol. 565] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 566] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
No. 38384

BERT SMITH, Plaintiff,

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES III, Trustees of the Property of FLORIDA EAST COAST RAILWAY COMPANY, a Florida Corporation, Defendant.

VERDICT—May 11, 1959

We, the Jury find the Defendant, Not Guilty

So say we, all.

Harry Warren, Foreman.

Dated May 11, 1959.

[fol. 567] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY
AT LAW
No. 38384-K

BERT SMITH, Plaintiff,

vs.

JOHN W. MARTIN, as Trustee of the property of the FLORIDA EAST COAST RAILWAY COMPANY, a corporation, Defendant.

FINAL JUDGMENT—May 14, 1959

This Cause coming on to be heard before the Honorable Ray Pearson, one of the Judges of the above-styled Court,

and a jury of six true and lawful men, who having been first duly sworn according to law, and having been directed to return a verdict in favor of the defendant by the Honorable Ray Pearson at the conclusion of the plaintiff's evidence as to liability alone, did return the following verdict, to-wit:

"We, the Jury, find the defendant not guilty.

"So say we all.

/s/ HARRY WARREN
Foreman"

Dated: May 11, 1959.

It Is Therefore, Ordered and Adjudged that Final Judgment be, and it is hereby entered in said cause in favor of the defendant and that the plaintiff, Bert Smith, shall take nothing by this action, and go hence without day.

[fol. 568] Done and Ordered in Chambers, at Miami, Dade County, Florida, this 14th day of May, 1959.

Ray Pearson, Circuit Judge.

[fol. 569] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
AT LAW

No. 8384-K

BERT SMITH, Plaintiff,

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES III, as Trustees of the Property of the FLORIDA EAST COAST RAILWAY COMPANY, a Florida Corporation, Defendants.

FINAL JUDGMENT—June 18, 1959

This Cause coming on to be heard before the Honorable Ray Pearson, one of the Judges of the above-styled Court,

and a jury of six true and lawful men, who having been first duly sworn according to law, and having been directed to return a verdict in favor of the defendants by the Honorable Ray Pearson at the conclusion of the plaintiff's evidence as to liability alone, did return the following verdict, to-wit:

"We, the Jury, find the defendant not guilty.

"So say we all.

/s/ HARRY WARREN
Foreman"

Dated: May 11, 1959.

It Is Therefore, Ordered and Adjudged that Final Judgment be, and it is hereby entered in said cause in favor of the defendants and that the plaintiff, Bert Smith, shall take nothing by this action, and go hence without day.

[fol. 570] Done and Ordered in Chambers, at Miami, Dade County, Florida, this 18th day of June, 1959.

Ray Pearson, Circuit Judge.

[fol. 571] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
AT LAW

No. 38384-K

[Title omitted]

ASSIGNMENTS OF ERROR—Filed June 26, 1959

Plaintiff, Bert Smith, assigns the following as error to be relied upon in the District Court of Appeal, Third District, for reversal of this cause:

1. The court erred in entering Final Judgment for the Defendants,

2. The court erred in directing a verdict for the defendants.

Nichols, Gaither, Green, Frates & Beckham, Attorneys for Plaintiff, By: Alan R. Schwartz, Of Counsel, 448 Pan American Bank Building, Miami 32, Florida.

Certificate of Service (omitted in printing).

[fol. 572] Directions to Clerk—Filed June 26, 1959 (omitted in printing).

[fol. 574] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 575] [File endorsement omitted]

In the District Court of Appeal of Florida

Third District

Law 38384

Mandate—Dated March 15, 1960, filed March 16, 1960

To the Honorable, the Judges of the Circuit Court for the Eleventh Judicial Circuit of Florida. Greeting:

Whereas, Lately in the Circuit Court of the Eleventh Judicial Circuit in and for the County of Dade in a cause wherein

Bert Smith, Plaintiff,

and

J. Turner Butler and William A. Hallowes III, as Trustees of the Property of the Florida East Coast Railway Company, a Florida Corporation, Defendants.

(Law No. 38384)

the judgment of said Circuit Court was rendered June 19, 1959 as by the inspection of the transcript of the record

of the said Circuit Court which was brought into the District Court of Appeal, Third District of the State of Florida, by virtue of an appeal agreeably to the laws of said State in such case made and provided, fully and at large appears:

And Whereas, at the January Term of said District Court of Appeal holden at Coral Gables, A. D. 1960, the said cause came on to be heard before the said District Court of Appeals on the said record on appeal and was argued by counsel; in consideration whereof, on the 25th day of February, A. D. 1960 the said District Court of Appeals rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof.

In Consideration Whereof, It Is Ordered by the Court that the appellees do have and recover of and from the appellant costs in this behalf expended herein, and that all other costs shall be taxed in the court in which the appeal was entered, therefore,

You Are Hereby Commanded, That such further proceedings be had in said cause as according to right, justice, the judgment of said District Court of Appeal and the laws of the State of Florida, ought to be had, the said judgment of the Circuit Court notwithstanding

Witness, The Honorable Mallory Horton, Chief Judge of said District Court of Appeal, and the seal of said Court at Coral Gables, this 15th day of March, 1960.

William P. Carter, Clerk District Court of Appeal,
Third District of Florida.

[Seal]

[fol. 576]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

January Term, A.D. 1960

Case No. 59-384

BERT SMITH, Appellant,

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES III, as Trustees of the property of FLORIDA EAST COAST RAILWAY COMPANY, a Florida corporation, Appellees.

An Appeal from the Circuit Court for Dade County, Ray Pearson, Judge.

Nichols, Gaither, Green, Frates & Beckham and Sam Daniels, for appellant.

Harold B. Wahl and Scott, McCarthy, Preston, Steel & Gilleland and Dwight Sullivan, for appellees.

OPINION PER CURIAM—Filed February 25, 1960

This cause appeared before this court upon a prior appeal. See Butler v. Smith, Fla. App. 1958, 104 So. 2d 868. Upon the return of the cause to the trial court pursuant to our mandate, the plaintiff elected to stand exclusively upon his claim, under the Federal Employer's Liability Act, that the railroad had no right to give the field test. The trial court entered judgment under authority of our prior opinion in this case. The plaintiff now appeals from this judgment. The only assignment of error presented is that the court erred in directing a verdict for the defendants. Appellant's brief recites "The sole purpose of this [fol. 577] appeal is to obtain a record on which this court's prior decision in Butler v. Smith, Fla. App. 1958, 104 So. 2d 868, can be reviewed by the Supreme Court of the United States."

The judgment of the trial court is affirmed upon the authority of Butler v. Smith, supra.

Affirmed.

Horton, C.J., Pearson and Carroll, Chas., JJ., concur.

[fol. 578] [File endorsement omitted]

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1960.

BERT SMITH, Petitioner,

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES III, as Trustees of the property of FLORIDA EAST COAST RAILWAY COMPANY, a Florida corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI DENIED—
May 13, 1960

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Third District, in said cause bearing date February 25, 1960, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

[fol. 579] Clerk's Certificates to foregoing transcript (omitted in printing).

[fol. 581]

SUPREME COURT OF THE UNITED STATES

No. 313, October Term, 1960

BERT SMITH, Petitioner,

—vs.—

J. TURNER BUTLER, *et al.*, Trustees

ORDER ALLOWING CERTIORARI—October 24, 1960.

The petition herein for a writ of certiorari to the District Court of Appeal of the State of Florida, Third Appellate District, is granted and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

BERT SMITH,
Petitioner,

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III, As Trustees of the Property of Florida East Coast Railway Company, a Florida Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

WILLIAM S. FRATES,
Attorney for Petitioner,
of NICHOLS, GAITHER, GREEN, FRATES & BECKHAM,
1111 Brickell Avenue,
Miami 32, Florida.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

BERT SMITH,
Petitioner,

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III, As Trustees of the Property of Florida East Coast Railway Company, a Florida Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

Petitioner, Bert Smith, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, affirming the judgment entered for respondents pursuant to a directed verdict by the Circuit Court for the Eleventh Judicial Circuit of Florida in this action under the Federal Employers' Liability Act, 45 U.S.C., Sec. 51, *et seq.*

OPINIONS BELOW.

The first opinion of the Third District Court of Appeal is reported at 104 So.2d 868 and is set out in Appendix A. The second opinion of the Third District Court of Appeal is reported at 118 So.2d 237, and is set out in Appendix B. The order of the Supreme Court of Florida on May 13, 1960, denying certiorari is unreported and is set out in Appendix C.

JURISDICTION.

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTION PRESENTED.

Did the Florida Appellate Court err in holding that when a railroad employee sustains personal injuries while performing an alleged physical fitness field test ordered by the railroad that the provisions of the Railway Labor Act, 45 U.S.C., Section 151, *et seq.*, preclude him from claiming that the giving of such a test under the facts and circumstances of this case was an act of negligence under the Federal Employers' Liability Act, 45 U.S.C., Section 51, *et seq.*?

STATUTES INVOLVED.

The pertinent sections of the Railway Labor Act and the Federal Employers' Liability Act are set out in Appendix D.

STATEMENT.

Petitioner fell and received injuries which totally and permanently disabled him in 1956 (R. 132-134). The events leading to his downfall are unique.

In 1956, respondents urged petitioner to retire. He refused (R. 51-56, 92, 213, 238). At that time, petitioner was sixty-one years old; 5'3" tall; and weighed 262 pounds (R. 212, 137, 117). He had rendered respondents thirty-six years of continuous service without a single demerit (R. 61, 212, 223, 362). Although his stamina and agility were impaired by arthritis and his portly physique, he was declared physically "*fit for duty as a flagman*" by the railroad's local doctor in Miami in August of 1956 (R. 39-44). This medical opinion was shared by respondents' chief surgeon who examined petitioner on September 10, 1956 (R. 119-120).

Respondents did not acquiesce in petitioner's retirement refusal. On September 13, 1956, petitioner became the first employee ever required to take a physical fitness "field test" in the history of respondents' railroad (R. 51, 68, 104, 115-116, 158). Respondents' supervisor who ordered petitioner to retire or take the test (R. 55-56, 93, 238) admittedly devised a test which he believed petitioner was physically unable to perform (R. 102, 106-108).

The "field test" in question required the 262 pound petitioner to walk a mile of track on a hot, humid day (R. 266, 187-189, 248) at a place described by one of respondents' conductors as follows:

> "They could have picked the whole railroad and never picked a worse spot to have a man walk than they did." (R. 384).

The portion of the track selected was littered with pieces of wire and covered with rocks and weeds (R. 384, 250). After walking some 1,000-1,500 feet, petitioner became entangled in a piece of wire and fell (R. 159-160, 182, 216). During the next 1,500 feet, he fell a second time on more wire; and finally fell a third time to rise no more (R. 161-163, 217-218). Even though petitioner was rushed to a doctor and received immediate medical attention (R. 162-163), the series of falls rendered him totally and permanently disabled (R. 132-134).

Petitioner sued respondents under the FELA setting out eight separate allegations of negligence (R. 2). The first two allegations of negligence were:

"a. In negligently and unlawfully requiring the plaintiff to participate in such a 'field test';

b. In negligently allowing its servants, agents or supervisors to conduct such a 'field test';" (R. 2).

The remaining six charges concerned failure to provide a reasonably safe place to work (R. 2).

At the trial, respondents contended that their right to give the test, or the manner in which it was given, could not be questioned in a FELA action and that petitioner could only complain of the matter in proceedings under the Railway Labor Act. The trial judge rejected this contention (R. 103, 292-295), and the case was tried accordingly.

Extensive evidence was offered tending to show that the railroad was negligent in requiring petitioner to perform the particular field test in question. Evidence was likewise introduced to show that the test was actually designed to force retirement rather than to determine petitioner's fitness as a flagman.

Among other things, petitioner's evidence showed that:

1. No other employee had ever been required to take such a test in the whole history of the railroad (R. 51, 68, 104, 115-116, 158);

2. For reasons best known to respondents, petitioner was told to either retire or take the test (R. 55-56, 93, 238). Until this ultimatum, respondents had always left questions of physical fitness to its medical department. A sick employee could not return to work until the medical department gave him a "fit for duty" slip called a "C.S.1" (R. 39-40, 109-110); and respondents' supervisors could order a physical examination of any working employee whose fitness was questioned (R. 50). The supervisor who ordered the "field test" did not require petitioner to take a physical examination for the admitted reason that he knew the medical department considered petitioner fit for service (R. 53).

3. The particular test given was one which respondents' supervisor admittedly believed petitioner was physically unable to perform (R. 102, 106-108).

4. It was not necessary for flagmen, such as petitioner, to walk a mile in performing their duties and the field test devised was not a true test of a person's ability as a flagman (R. 28-30, 70-71, 81, 100, 351-352, 395).

After all the evidence was in, the trial resulted in a $30,000.00 jury verdict and final judgment for petitioner (R. 497-498). The exact scope and effect of petitioner's evidence need not be further detailed or discussed because of the holding on appeal—no matter what the evidence, petitioner could not question respondents' right to give him the test. The District Court of Appeal, Third District, reversed petitioner's jury verdict and judgment with a holding that:

"* * * There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U.S.C.A., §151 et seq. Consequently, we do not consider that items 1 and 2 under the charge of negligence, supra, constituted triable issues. * * *" 104 So.2d at 869-870.

The case was remanded to the trial court for retrial on the remaining six allegations of negligence. At this stage of the proceedings, the Florida appellate court's holding was not subject to review by this Court because no final judgment had been entered. *Lavender* v. *Kurn*, 329 U.S. 762; 28 U.S.C., Sec. 1257(3).

The events which occurred on remand and on the second appeal of the case are succinctly summarized in the Third District Court of Appeal's second opinion in the case:

"This cause appeared before this court upon a prior appeal. See Butler v. Smith, Fla. App. 1958, 104 So.2d 868. Upon the return of the cause to the trial court pursuant to our mandate, the plaintiff elected to stand exclusively upon his claim, under the Federal Employers' Liability Act, 45 U.S.C.A., §51 et seq., that the railroad had no right to give the field test. The trial court entered judgment under authority of our prior opinion in this case. The plaintiff now appeals from this judgment. The only assignment of error presented is that the court erred in directing a verdict for the defendants. Appellant's brief recites 'The sole purpose of this appeal is to obtain a record on which this court's prior decision in Butler v. Smith, Fla. App. 1958, 104 So.2d 868, can be reviewed by the Supreme Court of the United States.'

The judgment of the trial court is affirmed upon the authority of Butler v. Smith, supra.

Affirmed." (118 So.2d 237).

After the Third District's affirmance of the directed verdict for respondents, petitioner sought review in the Supreme Court of Florida. The Florida Supreme Court denied certiorari on May 13, 1960.

FEDERAL QUESTION RAISED.

The Complaint (R. 1-3), trial proceedings, and opinions on appeal all show petitioner's repeated and continuous assertion of his rights under the FELA.

REASONS FOR GRANTING THE WRIT.

Petitioner urges this Court to grant this petition for a writ of certiorari to the District Court of Appeal of Florida, Third District, for the following reasons:

1. The decision below decides an important question of federal law regarding the interplay, if any, between two major Acts of Congress; the FELA and the Railway Labor Act.

2. The decision below decides a federal question of substance not heretofore determined by this Court, and decides it in a way probably not in accord with applicable decisions of this Court. The Railway Labor Act has thus far been regarded as legislation for the settlement of labor disputes. Cf. *Elgin, Joliet & Eastern Railway Co.* v. *Burley*, 325 U.S. 711; *Slocum* v. *Delaware L. & W. R. Co.*, 339 U.S. 239. Treating labor dispute legislation as a limitation on the FELA, conflicts with the liberal interpretation of the FELA which this Court has consistently demanded. *E.g., Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500.

3. The decision below is in direct conflict with the holding in *Barnes* v. *Public Belt R. R. Commission*, (E.D. La., 1951) 101 F. Supp. 200, 203, that:

> "Under Title 45, Section 51, United States Code Annotated, this court has jurisdiction of the claim by plaintiff against his employer for damages suffered by him through the negligence of his employer. The Railway Labor Act, 45 U.S.C.A., §§ 151-188, has no application to a claim for damages to the employee resulting from the negligence of an employer railroad. Elgin, Joliet & Eastern Railway Company v. Burley, 325 U.S. 711, 734, 65 S. Ct. 1282, 89 L. Ed. 1886; Virginian Railway Company v. System Federation No. 40, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789; Order of Railway Conductors v. National Mediation Board et al., 72 App. D.C. 299, 113 F.2d 531. * * *."

4. Since the Railway Labor Act contains no provision allowing damages for personal injuries, the decision below deprives petitioner of a remedy for injuries caused by a tortious act.

5. The decision below is clearly wrong and deprives petitioner of a $30,000.00 jury verdict and final judgment to which he is entitled under federal law.

CONCLUSION.

Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

William S. Frates,

WILLIAM S. FRATES,
Attorney for Petitioner.

APPENDIX A.

Opinion and Judgment of the District Court of Appeal of Florida, Third District.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

July 22, 1958.

Rehearing Denied Sept. 29, 1958.

Case No. 57-332.

J. Turner Butler and William A. Hallowes, III, as Trustees of the Property of Florida East Coast Railway Company, a Florida corporation, Appellants,

vs.

Bert Smith, Appellee.

An Appeal from the Circuit Court for Dade County, Ray Pearson, Judge.

Scott, McCarthy, Preston, Steel & Gilleland, and Dwight Sullivan, Miami, for appellants,

Nichols, Gaither, Green, Frates & Beckham, and Sam Daniels, Miami, for appellee.

HORTON, Judge.

This was an action for personal injuries brought under the Federal Employers' Liability Act, 45 U.S.C.A., § 51, *et seq.* Final judgment in favor of the appellee was entered after a jury verdict. The appeal is from the final judgment.

Smith, 61 years of age, had been in the employ of the appellant railroad for approximately 37 years. For the last five or six years of his employment, Smith had been a flagman on passenger trains. His duties as a flagman were relatively few unless the train made an emergency stop or was otherwise delayed, in which event, he was required to set flares and place other warning signals at least one mile down the track to avert possible danger from oncoming trains.

For some time, Smith had suffered from arthritis and obesity. In the early part of 1956, a trainmaster of the appellant observed Smith's handicapped condition and questioned his ability to perform the duties of a flagman. An attempt was made to persuade Smith to retire but he declined. The appellant then authorized a "field test" to determine if Smith was capable of performing the duties of flagman. This test consisted of walking a mile along the railroad track from one mile post to another, since this would coincide with the duties Smith would be required to perform under emergency conditions. After traversing some 3,000 feet of the mile walk, Smith fell in exhaustion and injured his knee. He was hospitalized, returned to his home but never returned to work. Smith attributed his fall and injuries to two factors, *i. e.*, walking on gopherberry leaves which caused the soles of his shoes to become slippery, and becoming entangled in wire lying along the track.

The negligent acts or omissions charged in the complaint were:

(1) Requiring the appellee to participate in a field test;

(2) Allowing agents of appellant to conduct a field test;

(3) Furnishing a dangerous and unsafe location to conduct a field test;

(4) Furnishing a dangerous and unsafe place in which to work;

(5) Failure to use ordinary care in providing a safe place of work;

(6) Failure to provide a reasonably safe place to work;

(7) Failure to provide proper equipment and safeguards in the performance of duties and participation in a field test; and

(8) Failure to provide adequate supervision and instructions in conducting the field test.

The appellant's main point for reversal is the prejudicial manner in which the trial was conducted on behalf of the appellee. There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U.S.C.A., §151, *et seq.* Consequently we do not consider that items 1 and 2 under the charge of negligence, *supra*, constituted triable issues. The real issue in the case, which was apparently forgotten, was whether the appellant provided a reasonably safe place for appellee to work or perform the duties assigned him. *Seaboard Air Line R. Co.* v. *Gentry*, Fla. 1950, 46 So.2d 485; *Seaboard Air Line R. Co.* v. *Hardee*, Fla. 1951, 54 So.2d 809.

We have carefully reviewed the record in this cause, including the opening statements of counsel to the jury prior to the trial and the statements of counsel to the jury after the close of all the testimony, and are im-

pelled to the conclusion that this case was tried upon an immaterial issue tending toward and resulting in an unfair trial to the appellant. A large portion of appellee's opening statement to the jury prior to the trial spotlighted the theme upon which this cause was tried, namely, that appellant was "out to get" the appellee, that the test was never given to anyone before in the history of the railroad, and was a scheme cooked up to get rid of the appellee. Appellee's counsel, in his argument after the testimony had been completed, dwelled at length on the "get rid of Bert Smith" attitude and conduct of appellant. Appellee's concluding statement in his main argument at the close of all the testimony was:

> "Now I think you could stand up here and say that this was a dirty, rotten trick they pulled on this guy because that's my personal opinion. They were out to get him, and they did. They got him good; they got him so he won't work any more for them, and the law says—not my law—not the judge's law, but your law—says that under those circumstances they should pick up the check."

The appellee's entire case as reflected by this record conclusively indicates that it was premised upon the claim that appellant's conduct in requiring the appellee to take a field test was unlawful and that all of his injuries and damages resulted from such unlawful act. Nowhere in the pleadings has the appellee sought punitive damages. It is readily apparent that the jury could have been and was misled as to what the real issues were in the case. It would serve little purpose to delineate the many incidents appearing in the record which illustrate the basis for our conclusion that the cause should be reversed. However, the immateriality of the issues raised, as well as their prejudicial effect, were pointed out to the trial judge by ap-

pellants' motion for new trial. The motion should have been granted.

An appellate court is always reluctant to reverse a judgment based on a jury verdict for in doing so, it of necessity must sit in judgment of the facts which appear in a cold typed record without the benefit of observing the demeanor and conduct of the witnesses on the stand. However, it is another matter to reverse a cause for new trial when the record of that trial clearly shows that the cause was tried on immaterial issues serving to implant in the minds of a jury prejudice or bias against one of the parties. We do not attribute to appellee's counsel sinister motives but rather an overzealousness for the interests of his client. However, when the result raises an emotional prejudice in the minds of the jury on an immaterial issue, then justice has been thwarted and the parties have been denied a fair and impartial trial of their cause. Cf. *Seaboard Air Line Railroad Company* v. *Strickland*, Fla. 1956, 88 So.2d 519, and *Seaboard Air Line Railroad Company* v. *Ford*, Fla. 1957, 92 So.2d 160, 165.

In view of the opinions expressed, we do not consider it necessary to discuss the other points raised by appellants. Accordingly, the judgment appealed from is reversed and the cause is remanded for a new trial.

Reversed and Remanded.

CARROLL, CHAS., C. J., and PEARSON, J., concur.

APPENDIX B.

Opinion and Judgment of the District Court of Appeal of Florida, Third District.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

February 25, 1960.

BERT SMITH, Appellant,

v.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III, As Trustees of the property of Florida East Coast Railway Company, a Florida corporation, Appellees.

An Appeal from the Circuit Court for Dade County; Ray Pearson, Judge.

Nichols, Gaither, Green, Frates & Beckham and Sam Daniels, Miami, for appellant.

Harold B. Wahl and Scott, McCarthy, Preston, Steel & Gilleland and Dwight Sullivan, for appellees.

PER CURIAM.

This cause appeared before this court upon a prior appeal. *Butler* v. *Smith*, Fla. App. 1958, 104 So.2d 868. Upon the return of the cause to the trial court pursuant to our mandate, the plaintiff elected to stand exclusively upon his claim, under the Federal Employers' Liability Act, 45 U.S.C.A., §51 *et seq.*, that the railroad had no right to give the field test. The trial court entered judgment under authority of our prior opinion in this case. The

plaintiff now appeals from this judgment. The only assignment of error presented is that the court erred in directing a verdict for the defendants. Appellant's brief recites "The sole purpose of this appeal is to obtain a record on which this court's prior decision in *Butler* v. *Smith*, Fla. App. 1958, 104 So.2d 868, can be reviewed by the Supreme Court of the United States."

The judgment of the trial court is affirmed upon the authority of *Butler* v. *Smith, supra*.

Affirmed.

HORTON, C. J., and PEARSON, and CARROLL, CHAS., JJ., concur.

APPENDIX C.

Order of the Supreme Court of Florida Denying Certiorari.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A.D. 1960

FRIDAY, MAY 13, 1960

BERT SMITH, Petitioner,

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III, as Trustess of the property of FLORIDA EAST COAST RAILWAY COMPANY, a Florida corporation, Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Third District, in said cause bearing date February 25, 1960, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

APPENDIX D.

Statutes Involved.

The Federal Employers' Liability Act, 45 U.S.C., Section 51, provides:

"51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE: DEFINITION OF EMPLOYEES.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation of nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as

above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Railway Labor Act provides in pertinent part:

"§151a. GENERAL PURPOSES.

The purposes of the chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

IN THE

Supreme Court of the United States

No. 313

BERT SMITH,

Petitioner,

v.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III, as Trustees of the Property of the FLORIDA EAST COAST RAILWAY COMPANY, a Florida Corporation,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of Title 28, U.S.C.A., § 1257(3). Since the District Court of Appeal of Florida, Third District, whose decision is sought here to be reviewed, determined—correctly, we submit—that the particular allegations of negligence relied upon by petitioner for recovery under the Federal Employers Liability Act (the remaining allegations of negligence having been abandoned), clearly presented no justiciable issue, and that

petitioner had no remedy under such Act, respondents assert that this Court is without jurisdiction in this cause to grant the Petition for Writ of Certiorari.

II.

QUESTION PRESENTED

Respondents submit that the real question presented to this Court in this proceeding is as follows:

> WHETHER OR NOT THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, ERRED IN HOLDING THE PETITIONER HAD NO CAUSE OF ACTION AGAINST RESPONDENTS UNDER THE CIRCUMSTANCES OF THIS CASE UNDER THE FEDERAL EMPLOYERS LIABILITY ACT FOR ALLEGED INJURY FROM A FALL SUSTAINED DURING THE COURSE OF A PROPERLY AUTHORIZED TEST GIVEN PETITIONER TO DETERMINE HIS QUALIFICATIONS TO PERFORM HIS REQUIRED DUTIES AS A FLAGMAN SOLELY UPON THE CLAIM THAT RESPONDENTS HAD NO RIGHT TO GIVE SUCH A TEST, PETITIONER HAVING ABANDONED ALL CLAIMS OF NEGLIGENCE FOR FAILURE TO EXERCISE REASONABLE CARE IN FURNISHING A SAFE PLACE IN WHICH AND EQUIPMENT WITH WHICH TO WORK?

III.

STATEMENT OF THE CASE

Reference herein made to the original record and to the appendices of the parties will be prefaced by the following symbols:

"R."	— for original Record.
"P.X."	— for Petitioner's Exhibits.
"R.X."	— for Respondents' Exhibits.
"Pet. App."	— for Petitioner's Appendix.
"R. App."	— for Respondents' Appendix.

Petitioner's Complaint contained eight separate allegations of negligence (R.2), the last six of which can be readily condensed into two charges: (1) failure to exercise reasonable care to provide a safe place in which and equipment with which to work and take the test; and (2) failure to provide adequate supervision and instruction in the conduct of the test. The first two allegations of negligence, which are set forth verbatim in the Petition for Writ of Certiorari, seek to contest respondents' right, allegedly under the Federal Employers Liability Act, to give the test at all. (R.2) The District Court of Appeal of Florida, Third District, held, on the first appeal, that petitioner could not raise, under the Federal Employers Liability Act, any issue as to the right or propriety of respondents to give the test, but that if he were grieved by virtue thereof, his claim for grievance was exclusively under the provisions of the Railway Labor Act, Title 45, U.S.C.A., § 151, et seq. (Pet. App. A-3). Accordingly, the Florida Court held that the first two charges of negligence did not present triable issues. (Pet.

App. A-3). The cause was remanded for re-trial because of the "emotional prejudice" engendered into the minds of the jury by petitioner's counsel on "an immaterial issue," denying respondents a "fair and impartial trial of their cause." (Pet. App. A-5).

Upon remand to the trial court, the petitioner refused to try the cause upon and abandoned the remaining six allegations of negligence, and elected to proceed solely upon the allegations predicated upon the right of respondents to give the petitioner the test at all, and, also, amended his Complaint to add a third allegation of negligence, to-wit: that respondents were negligent in requiring petitioner to take the test, knowing of his physical condition. (R. 550-551). Petitioner proffered the entire testimony of the first trial upon these issues, which proffer the trial court properly held inadmissible for the reason that petitioner had failed to show a substantial reason why the original witnesses were not produced. § 92.22, **Florida Statutes**, 1959. (R. 557, 568). The trial Court directed a verdict for respondents, and final judgment for respondents was thereupon entered. (R. 571, 572, 533, 534).

Upon appeal to the District Court of Appeal of Florida, Third District, from the final judgment entered upon said directed verdict, the judgment was affirmed upon the authority of the former decision of that Appellate Court. (Pet. App. A-6, 7). It is important to mention that on this second appeal to the Florida Appellate Court, petitioner expressly abandoned the third allegation of negligence which he made by amendment at the trial, (i.e. that respondents were negligent in requiring petitioner to take the test, knowing he was in a weakened physical

condition) and relied solely upon the original first two allegations of negligence. We quote from petitioner's brief, filed with the District Court of Appeal of Florida, Third District, on the second appeal (p. 3):

> **"During the proceedings on remand, counsel for Mr. Smith were allowed to amend the complaint to add a third charge of negligence which the trial judge then held insufficient under this Court's decision. (R. 541-555) However, in the interest of simplifying the issues we expressly abandon this third charge and present this appeal solely on the same two charges held insufficient on the first appeal."**

Respondents feel it necessary to clarify some of the misstatements of fact made by petitioner in his statement of the case, as well as to supply some important facts reflected by the record, which petitioner has omitted.

As of September, 1956, petitioner had been working some thirty-six years on the railroad, both as a flagman and as a baggageman, he having worked the last five years almost exclusively as a flagman on a passenger train (R. 212, 213, 224). He was then sixty-one years old, weighed about 262 pounds, having reduced his weight from 300 pounds, and was about five feet three inches tall. (R. 117, 137, 212, 215). Since 1942, petitioner had had trouble with arthritis (R. 232, 263, 266, 269). His chronic obesity (R. 164, 268) added to his arthritic difficulties because his heavy weight put more strain than ordinary upon his joints (R. 287). His arthritis was getting progressively worse (R. 267, 268). In March, 1956, petitioner consulted an orthopedic surgeon for arthritis in his left

knee, and was treated by him until May. (R. 283-385). He was confined and treated in the East Coast Hospital Association Hospital in St. Augustine, Florida, from May 21 through June 30, 1956, for arthritis and for a bladder infection. (R. 116). He then returned home to Miami, where he received further treatment for his knee, and then returned to work on August 16, 1956. (R. 116).

Although petitioner's work as a flagman is mostly occupied with inspecting the train, both prior to departure and while the train is in motion, his chief duty and the main purpose for his being on the train is, in the event of an emergency stop, to protect the rear of that train from other trains which may be approaching on the same track. (R. 225). This must be done at all hours of the day or night and regardless of weather conditions or anything else. (R. 93, 220). Under such circumstances, the respondents' rules require (R. 90):

> "When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fusees."

The flagman, by petitioner's own admission, must go back at least as far as the last signal block (the signal blocks being about a mile apart), in order to flag the train, (R. 28, 228), in the event the signal block might be inoperative. (R. 344). Unless the train happens to stop right at one of the signal blocks, the flagman must go back even farther than the last signal block to flag an approaching train, since he is required to place two torpe-

does on the track a sufficient distance back from his train that an approaching train on the same track will run over the torpedoes, explode them, and the engineer, hearing the explosion, can stop his train in time to avoid a collision. (R. 30-32, 90, 91, 195, 227-229). This means he should go back at least a mile, since it would take a passenger train approximately a mile, traveling at the maximum speed permissible, to stop. (R. 71). Even though an approaching train might be stopped in less than a mile by an emergency application of brakes, such stops are carefully avoided, if at all possible, in order to prevent injury to the many passengers on board. (R. 72, 73). In addition to placing the torpedoes on the track, the flagman is required to drop lighted fusees, or flares, as additional warning to the approaching train. (R. 30-32, 89, 90). Petitioner, by his own testimony, admitted having walked a mile along the railroad track on various emergency occasions in order to protect the rear of his train in the course of his duties as a flagman. (R. 227, 231, 232).

After petitioner's return to work, he was observed by respondents' trainmaster, Mr. Clark, to be having difficulty both in getting on and off the trains and in "walking the brakes"—the visual brake inspection required of a flagman—which exhausted petitioner. (R. 92, 93). From these observations, Mr. Clark felt that petitioner was unable to "properly" perform the duties required of a flagman in an emergency situation. (R. 84, 92; P.X. 3). Petitioner had been allowed by local physician to return to work after treatment for his knee, but, as Mr. Clark stated, the physician had no facilities for conducting a test of the man's ability to perform his required duties, nor the opportunity for observation of the man in the actual performance of his duties. (R. 37, 38). Petitioner's

physical examination by Dr. Lockwood in the East Coast Hospital Association Hospital on September 12, 1956, was for the represented purpose of obtaining a life insurance policy. (R. 116, 117).

Mr. Clark, as trainmaster, was, under respondents' rules, in "charge of the immediate train and yard service, of the movement of traffic *** and of the employees engaged therein", and "responsible for the organization of train crews and for the maintenance of an adequate force in the train service." (R.342;D.X. D). Because of this responsibility, and his responsibility for the safety of the traveling public, Mr. Clark went to petitioner, discussed with petitioner his condition and ability to perform his duties, and asked petitioner if he desired to retire. (R. 93). Petitioner replied no, that he anticipated working four or five more years. (R. 93).

Mr. Clark then wrote to respondents' General Superintendent, I. E. Hamilton, advising him of his observations of petitioner, and stating that should conditions arise requiring petitioner to go to the rear of the train to flag, he did not feel petitioner could do so properly. (R. 84; P.X. 3). Mr. Hamilton responded by authorizing a field test to be conducted to determine petitioner's ability to adequately perform his required duties. (R. 84; P.X. 3).

The actual field test was merely that which petitioner's duty would require him to do so as to flag a train in an emergency condition (R. 28, 30-32, 71, 90, 91, 195, 225-228), namely, walk a mile along the railroad track. (R. 63). This was a test which respondents' officials had unquestioned (even by the General Chairman of the Brotherhood of Railway Trainmen) authority to give petitioner.

(R. 199-202). And, as to the propriety of the type of test to be given, the Brotherhood Chairman stated that it was the only kind of qualification test you could give a flagman. (R. 180).

Petitioner erroneously tried to give this Court the impression that no field test or efficiency test had ever been given by the railroad to any other employee. Although this was the first test given a flagman by respondents, they had many times given efficiency tests in the field to various employees to determine their capability to properly do their job, including engineers and firemen. (R. 199, 200, 315). Such tests were given under what would be described as simulated emergency conditions. (R. 200).

Petitioner's statement that respondents' supervisor "admittedly devised a test which he believed petitioner was physically unable to perform" was not only a misstatement of fact, but calculated to mislead the Court to believe that someone deliberately sat down and devised some type of test which was impossible for anyone to pass, and which had no relationship to petitioner's actual duties. The test, as above stated, was merely that which petitioner's duties might at any time require him to do, and Mr. Clark's expressed belief was not that petitioner could not possibly perform the test, but that he could not perform his required duties "properly." (R. 84, 102, 106, 107). Petitioner expressed to Mr. Clark his anxiousness to perform the test as to demonstrate his capability of doing his job. (R. 55).

Petitioner was advised he could have a representative with him at the test, and he brought with him both the

Chairman of the Brotherhood of Railway Trainmen, Mr. Baumberger, and the General Chairman of the Order of Railway Conductors and Brakemen, Mr. Delk. (R. 94). As far as the actual test is concerned, Mr. Clark and Mr. Johnson, respondents' road foreman of engines, as representatives of the railroad, and Mr. Delk and Mr. Baumberger, all participated in the test by walking the mile on the railroad track; Mr. Clark and Mr. Johnson walked the entire distance in nineteen minutes, while Mr. Delk and Mr. Baumberger took twenty-three minutes. (R. 97, 98, 159, 161, 184, 189, 310). Petitioner proved Mr. Clark's prior observations of him to be accurate, and justified his fear that petitioner was unable to properly perform his duty, by failing to complete the mile walk and actually covering only about three thousand feet of the five thousand two hundred eighty feet distance, and taking thirty-two minutes to do that. (R. 108). While petitioner sought to attribute his fall to water from gopher berry leaves on which he allegedly stepped, making his shoes slippery (R. 218), Mr. Delk attributed petitioner's fall to utter exhaustion. (R. 375). Petitioner was the only one of the five men who fell. (R. 250).

Petitioner's claim for damages was limited to an alleged aggravation of pre-existing arthritis in the left knee. (R. 132).

IV.

ARGUMENT

The Petition for Writ of Certiorari is but a continuance of petitioner's emotional play, which began with the trial jury, that respondents were "out to get" petitioner,

and, in order to do so, devised a test which they knew he would fail and cause him injury. The record clearly fails to support such a contention, as the test was not only within the admitted authority of respondents to require, but was nothing more stringent than petitioner's own job required him to do; and upon petitioner's ability to properly perform his duty depended the lives of thousands of passengers and other employees of respondents' railway. The giving of the test may well have resulted in the saving of many lives and property, as regrettable and unfortunate as petitioner's failure to pass it, and his fall, may have been.

This emotional play of petitioner, and petitioner's vivid description of the rocks and gopherberry leaves, etc., and of the details of the walk itself, as well as of his injuries, have no place in this proceeding before this Court, as petitioner has expressly abandoned his allegations of negligence under the Federal Employers Liability Act, with respect to the alleged failure of respondents to furnish him with a safe place in which and safe equipment with which to work or take the test, which the Florida Appellate Court held to have raised justiciable issues, but which petitioner refused to go to trial on.

Petitioner, as pointed out above, has also expressly abandoned his allegation made by amendment, after remand by the Appellate Court for a re-trial, to the effect that respondents were negligent in requiring petitioner to take the test, knowing of his likelihood of injury because of petitioner's physical condition. The sole claim left, and upon which petitioner solely relied for recovery, was the right of respondents to require petitioner to take the test

at all. Such is accurately stated by petitioner's counsel at the pretrial conference before the trial court (R. 522):

> "***our whole position in this case is that requiring this fellow to take this test and conduct this thing was the negligence in the case and a violation of F.E.L.A."

The Florida District Court of Appeal quite correctly determined that such a claim was not cognizable to predicate liability under the Federal Employers Liability Act, but, if a grievance, was remediable under the Railway Labor Act. Petitioner's statements, as reasons for the granting of the Writ prayed for, that the Florida Court's decision decides an important question of Federal law requiring interplay, if any, between two major Acts of Congress, and decides a Federal question of substance not in accord with the applicable decisions of this Court, are wholly erroneous. The judgment of the Florida District Court of Appeal decided nothing but that the sole remaining allegations relied upon by petitioner relating to the right to give the test were matters cognizable only under that Act, in which the matter of railroad employees' ability to perform their pobs, and of requiring a field test to so determine, has always been cognizable — the Railway Labor Act. If the Federal Employers Liability Act were extended to cover claims of the nature relied upon by petitioner, it would open the door to countless claims for damages for personal injury, based upon nothing more than the fact that an employee was injured while doing something in response to a proper order by superiors, which the employee decides afterwards he will claim should not be given at all. It would likewise place back in the laps of the Courts labor grievances — the very

thing the Railway Labor Act was designed to alleviate and avoid — under the guise of an F.E.L.A. damage claim. Such was not the intention of Congress, nor have the Courts held it to be so.

We have quoted in the Appendix to this Brief pertinent provisions of the Railway Labor Act. (R. App. 1-11). Its purposes are set forth in § 151a, Title 45, U.S.C.A. (R. App. 1, 2), and are stated by this Court in **Union Pacific Railroad Co. v. Price**, 360 U.S. 601, 3 L. Ed. 2d 1460, 79 S. Ct. Rep. 1351 (3 L. Ed. 2d, at p. 1465):

> ". . . .
> "The purpose of the Railway Labor Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees to 'insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies.' HR. Rep. No. 328, 69th Cong., 1st Sess. p. 1. . . . ."

The Railway Labor Act was specifically "passed to aid in solving problems which arise out of the relation of employer and employee engaged in interstate commerce." **Brand v. Pennsylvania R. Co.** (D.C., E.D. Pa.), 22 F. Supp. 569. The Act establishes the National Railroad Adjustment Board, and prescribes for its membership and for its jurisdiction over disputes arising out of "grievances or out of the application or interpretation of a grievance covering rates of pay, rules or working conditions." Title 45,

U.S.C.A., Secs. 151a, 153. The Act "clearly includes within the term 'grievance' a dispute between the individual employee and the carrier." **Thomas v. New York, Chicago and St. Louis R. Co.** (C.C.A. 6th Cir. 1950), 185 F. 2d 614, 616. The Railway Labor Act also sets up the National Mediation Board, prescribes its membership and defines its jurisdiction, which, essentially, extends over matters not within the jurisdiction of the National Railroad Adjustment Board.

Since the passage of the Railway Labor Act, one of the classic fields in which the National Railroad Adjustment Board has exercised its conferred jurisdiction, on so many occasions, has been that involving disputes between the individual employee and the employer with respect to the employee's ability and competency to perform the duties of his employment in view of his physical condition, as well as the manner in which same should be determined. Several of such disputes presented to and adjudicated by the National Railroad Adjustment Board and over which that Board expressly avowed jurisdiction, are reflected in the pertinent excerpts from some of such published Awards of the Board incorporated in the Appendix to this Brief. (R. App. 11-29). The Board has, in innumerable instances, made its determination and award based upon the results of a field test ordered by the Board to be given the employee. E.g. Award No. 6202 First Division (R. App. 11-13); Award No. 6383, First Division (R. App. 14, 15); See also, Award No. 977, Fourth Division (R. App. 25-29); Award No. 12882, First Division (R. App. 16-19).

The sole remaining claim of petitioner in this cause is one which historically has been always considered a la-

bor grievance over which the National Railroad Adjustment Board, under the Railway Labor Act, has exclusive jurisdiction. When the Board has jurisdiction, no Court, State or Federal, has the power under the guise of any other Act, to invade same. **Slocum** v. **Delaware L. & W. R. Co.**, 1950, 339 U. S. 239, 70 S. Ct. Rep. 577, 94 L. Ed. 795.

The decision of this Court in **Rogers** v. **Missouri P. R. Co.**, 352 U. S. 500, 77 S. Ct. Rep. 443, 1 L. Ed. 2d. 515, cited by petitioner, did not extend the Federal Employers Liability Act, to cover a matter which clearly constitutes a labor grievance. The case of **Barnes** v. **Public Belt R.R. Commission** (D.C. E.D. La.) 101 F. Supp. 200, with which petitioner contends the decision of the Florida District Court of Appeal conflicts in the instant case, has no application or relevancy whatever to this case. The **Barnes** case simply involved an action for damages under the Federal Employers Liability Act, for injuries sustained by a switchman who fell from the top of a car of a train, which it was alleged, and proved, negligently made an unexpected and unnecessary emergency stop.

V.

CONCLUSION

There is nothing involved here except an attempt on the part of petitioner to convert a labor grievance into a basis for liability under the Federal Employers Liability Act. Petitioner refused to proceed to trial on what the Florida Appellate Court held to be triable issues under the Federal Employers Liability Act, and petitioner even expressly abandoned his oral amendment, made after the remand of this cause to the trial Court for a re-trial, to

the effect that respondents were negligent in ordering the test when they knew that petitioner was in a weakened physical condition. The right to give the test, or require the test, being the sole matter upon which petitioner elected to stand, clearly presented no justiciable issue under the Federal Employers Liability Act, but was correctly held by the District Court of Florida, Third District, to be a matter cognizable only under the Railway Labor Act. This cause involves no new or novel principle of law, and certainly is not in conflict with any of the decisions of this Court or any other Federal Courts.

Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

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I HEREBY CERTIFY that a copy of the above Brief and Appendix to Brief of Respondents in Opposition to Petition for Writ of Certiorari, was delivered to Nichols, Gaither, Green, Frates and Beckham, Esquires, Attorneys for Petitioner, 1111 Brickell Avenue, Miami 32, Florida, this 8th day of September, 1960.

E. F. P. BRIGHAM

IN THE

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APPENDIX TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

PERTINENT PROVISIONS OF THE RAILWAY LABOR ACT, TITLE 45 U.S.C.A.:

"§ 151a. General purposes

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of

employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

§ 152. General duties—Duty of carriers and employees to settle disputes

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

". . . .

"§ 153. National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards

"First. There is established a Board, to be known as the 'National Railroad Adjustment Board,' the members of which shall be selected within thirty days after June 21, 1934, . . ."

". . . .

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train-and-yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the

appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: **Provided, however,** That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties of either party to the dispute may certify that fact to

the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum

to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"....

"§ 154. National Mediation Board—Board of Mediation abolished; National Mediation Board established; composition; term of office: qualifications; salaries; removal

"First. The Board of Mediation is abolished, effective thirty days from June 21, 1934, and the members, secretary, officers, assistants, employees, and agents thereof, in office upon June 21, 1934, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this chapter had not been passed. There is established, as an independent agency in the executive branch of the Government, a board to be known as the 'National Mediation Board', to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. The terms of office of the members first appointed shall begin as soon as the members shall qualify, but not before thirty days after June 21, 1934, and expire, as designated by the President at the time of nomination, one on February 1, 1935, one on February 1, 1936, and one on February 1, 1937. The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the

term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in office shall constitute a quorum for the transaction of the business of the Board. Each member of the Board shall receive basic compensation at the rate of $15,000 per annum, together with necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the Board on business required by this chapter. No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board.

"All cases referred to the Board of Mediation and unsettled on June 21, 1934, shall be handled to conclusion by the Mediation Board.

"A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.

" . . . .

"§ 155. Functions of Mediation Board—Disputes within jurisdiction of Mediation Board

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty

days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

II.

EXCERPTS FROM AWARDS OF NATIONAL RAILROAD ADJUSTMENT BOARD:

"Award No. 6202
Docket No. 12112

"NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

"PARTIES TO DISPUTE:

"ORDER OF RAILWAY CONDUCTORS

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE TEXAS AND PACIFIC RAILWAY COMPANY

"STATEMENT OF CLAIM: Claim that Conductor-brakeman M. A. Hughes should be allowed to exercise his seniority as train baggageman and should be paid for time lost ac-

count deprived of service from January 16, 1941, and subsequently until he is allowed to exercise his seniority as train baggageman.

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The evidence of record in this docket shows that Conductor-Brakeman Hughes voluntarily left respondent carrier's service, April 13, 1930, account physical disability, and has not been in railroad service since that time, although his seniority as conductor-brakeman-baggageman has been perpetuated on the roster. His physical disability is acknowledged by all parties concerned, but it is contended by petitioner that he should be given a field test to ascertain whether or not he is physically able to perform the duties of train baggageman, and, if so, be allowed to exercise his seniority in that capacity.

"Without regard to Paragraph (a), Articles 40-41 of respective agreements here in evidence, reading:

"'The proper performance of their duties will be considered satisfactory test of the physical ability of all employes **now in service.**'"

and without interpreting said rule or establishing precedent thereunder, the Division holds that in the instant case, the result of a practical field test of sufficient duration, under average service conditions, under observation of representatives of the respective parties to this dispute, should be an acceptable determination of claimant's qualifications for service as a train baggageman.

"It is accordingly held that complainant Hughes shall be permitted to exercise his seniority as train baggageman, without pay for any time lost, provided he shall qualify for such service by a practical field test of sufficient duration, under average service conditions, under observation of representatives of the respective parties to this dispute, which test shall be promptly accorded him.

"AWARD

"Claim disposed of per Findings.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMENT BOARD

"ATTEST: (Sgd.) T. S. McFarland
"Secretary

"Dated at Chicago, Illinois, this 11th day of November, 1941."

"Award No. 6383
Docket No. 13261

"NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

"The First Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS

"STATEMENT OF CLAIM: Claim of Yardman C. H. Hackler for time lost by reason of being deprived of service December 16, 1940, and on all subsequent dates until permitted to exercise his seniority as yard foreman and/or helper.

". . . .

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"The Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"Article 2-(b) of the Yard Agreement provides that yardmen may exercise their seniority for permanent vacancies as switchtenders, their seniority as such to date from November 19, 1919; but it does not provide that they shall thereby lose their seniority as yardmen. Therefore claimant was entitled to exercise his seniority as yard foreman and/or helper, subject, under the circumstances, to the demonstration of the proper performance of his duties, under Article 25-(a).

"Due to his rating of 50% permanent disability there is no presumption of his ability to perform the duties, and he is therefore not prima facie entitled to pay for the time lost. But he is entitled to a reasonable field test, and upon demonstrating his fitness he is entitled: (1) to exercise his seniority as claimed; and (2) to receive pay for all time lost, with reduction for other wages received from the carrier, in the absence of proof that his condition was not materially worse when the field test should have been given.

"The evidence of record and the rules cited supported the claim, subject to the above conditions.

"AWARD

"Claim sustained in accordance with above Findings.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMENT BOARD

"ATTEST: (Sgd.) T. S. McFarland
"Secretary

"Dated at Chicago, Illinois, this 29th day of January, 1942."

"Award No. 12882
Docket No. 20814

"FIRST DIVISION

"NATIONAL RAILROAD ADJUSTMENT BOARD
39 South La Salle St., Chicago 3, Illinois.

"The First Division consisted of the regular members and in addition Referee George E. Bushnell when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE TEXAS AND PACIFIC RAILWAY COMPANY

"STATEMENT OF CLAIM: Claim of Conductor J. W. Rothwell, employed Fort Worth-Texarkana via Mineola Seniority district, that he should be allowed to exercise his seniority, first on position as passenger conductor, second on position as train Baggageman in accordance with his seniority rights and/or rights to service as such and his request dated October 3, 1944, and pay for time lost as results of his request being denied by Superintendent R. C. Parker, September 7, 1944 forward. (Carrier's File T-19172.)

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence finds that:

"The carrier or carriers and the employe or em-

ployes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"The First Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"This claim arises out of the denial of claimant's request to be allowed to exercise his seniority, first as a passenger conductor, and second, as train baggageman. His injury while in service as a freight conductor on January 12, 1944 necessitated amputation of his left foot, and later a higher amputation. He received $11,500 in settlement of his claim and executed a release therefor on October 9, 1944. This release does not recite total or permanent disability nor does the record indicate that claimant asserted such a condition, hence it cannot be held that the settlement was based on that contention.

"Prior to settlement for his injury, he verbally requested permission to exercise his seniority on September 6, 1944. This was denied orally by the superintendent on September 7, and again in writing on October 20, following claimant's formal written request on October 3.

"The Vice President on appeal held on December 13 that his 'injuries totally and permanently disabled him from performing any character of train service,' and that by his settlement he ceased to be an employe of the company.

"The carrier moved this Division to dismiss this ex parte submission on four grounds which may be summarized as follows:

"(1) The Division lacks jurisdiction in the premises under the Railway Labor Act.

"(2) The dispute, if any, arises out of an injury and not a grievance.

"(3) The claim is barred by the terms of the written release.

"(4) Claimant relinquished all employment rights upon execution of the release in the light of his knowledge of his permanent physical disqualification.

"Claimant also seeks 'pay' for time lost as a result of his request being denied, * * *.'

"Decision is controlled by the language of the release. The rule heretofore followed is — if the release is broad enough to include the release of any claim growing out of the loss of seniority rights, the claim will be denied. If the release is special and relates only to the accident, it cannot be said to constitute a release of seniority rights and the claim will be sustained. See Award No. 4931, Award No. 5299 (Summons). See also Award 8265 (Simmons), Carrier's dissent, and sustaining opinion therewith.

"Claimant was not, by the carrier's own admissions, separated from the service when he requested permission to exercise his seniority on September 6, 1944. His

separation, if any was not effected, according to carrier's statement, until October 19, 1944. Hence the Division has jurisdiction. Nor did it lose jurisdiction by reason of the release, which is special in nature and confined to the injury. Claimant did not therein waive any seniority rights and only denied 'promise of employment,' and 'other agreement not herein expressed.'

"Under the interpretation to Award 8265, claimant should be 'reinstated to his former seniority standing.' His restoration to service must, however, depend upon his ability to perform that service. This cannot be determined on this record by this Division, but must abide the usual and customary practice on the property and under the terms of the working agreement.

"Nor, under the circumstances here disclosed, is claimant entiled to compensation until his ability to perform service is determined.

"AWARD

"Claim sustained, but only as to restoration to former seniority standing, and without prejudice to appropriate further action on the property, and also without payment for time lost.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMENT BOARD

"ATTEST: (Sgd) T. S. McFarland
"Executive Secretary

"Dated at Chicago, Illinois, this 26th day of July, 1949."

"Award No. 14218
Docket No. 23644

"FIRST DIVISION
"NATIONAL RAILROAD ADJUSTMENT BOARD
39 South La Salle St., Chicago 3, Illinois

"The First Division consisted of the regular members and in addition Referee Francis J. Robertson when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE NEW YORK CENTRAL RAILROAD COMPANY — BUFFALO AND EAST

"STATEMENT OF CLAIM: Claim of C. E. Nellis, formerly employed as Yard Helper at Watertown for reinstatement to active service as switchtender with seniority unimpaired based on Schedule Articles 40 (m) and 62 of the Trainmen's Agreement.

"This submission further involves a claim for payment of all time lost and vacation allotment account illegally held out of service October 30, 1946, and all subsequent dates, when a junior man was used to fill a switchtender's position in Watertown Yard.

". . . .

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"While employed as a yard helper in Carrier's Watertown Yard, claimant suffered an injury which resulted in the amputation of his left leg. He filed suit against Carrier and the same was amicably adjusted. Thereafter, he sought to displace a switchtender under a provision of the applicable agreement which, among other things, in effect, provides that when incapacitated for the duties of a foreman or helper, such employes will have the right to displace any able-bodied switchtender who entered the service subsequent to January 1, 1919, and who is junior in service. He was denied displacement rights on the ground that he was not physically able to perform the duties of the position.

"The discipline or investigation rule has no application to the facts of record in this docket, despite employes' contention to the contrary.

"Primarily, judgment in selecting and maintaining competent personnel for the operation of the railroad rests with the Carrier. However, that judgment may not be arbitrarily or capriciously exercised so as to deprive an employe of the rights which his collective bargaining agreement affords. Here, it is not denied that in the presence of Carrier officials claimant exhibited considerable

dexterity of locomotion unusual in one so handicapped. Yet, Carrier has taken the position, in effect, that solely because of the injury suffered, without physical examination at the time of attempting to exercise his displacement rights, claimant is physically incapable of performing the duties of the position for which he has applied.

"In accordance with the principles stated in the preceding paragraph we find that claimant should be afforded a physical examination by Carrier's medical department to determine his ability to discharge the duties of the involved switchtender position. If the employes are dissatisfied with the findings of the medical department, then claimant should be submitted to an examination by a board of three competent physicians, selected one by the Carrier, another by the Organization, and the third by the two thus selected; their findings to be used as a basis for determining his competence to fill the position. If found qualified, he should be permitted to exercise his displacement rights in the position sought and reimbursed for wage loss suffered commencing from October 30, 1946, less earnings in outside employment.

"AWARD

"Claim disposed of as per Findings.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMENT BOARD

"ATTEST: (Sgd.) T. S. McFarland
"Executive Secretary

"Dated at Chicago, Illinois, this 25th day of January, 1951."

"Award No. 14281
Docket No. 23027

"FIRST DIVISION

"NATIONAL RAILROAD ADJUSTMENT BOARD
39 South La Salle St., Chicago 3, Illinois.

"The First Division consisted of the regular members and in addition Referee LeRoy A. Rader when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE BALTIMORE AND OHIO RAILROAD COMPANY

"STATEMENT OF CLAIM: Request for restoration of Trainman G. C. Stewart to passenger service.

"JOINT STATEMENT OF FACTS: In April, 1945, Trainman G. C. Stewart, who had been working in Brunswick Yard, made request on Trainmaster to take turn as passenger flagman. Pursuant with that request, he was given an order by Trainmaster J. F. Stevens, dated April 20, 1945, to learn the necessary territory. After being examined on the road by Trainmaster, he was then assigned as passenger flagman to trains nos. 11 and 2nd 8, which he worked for six round trips. On completion of the sixth trip he was relieved from passenger service and returned to Brunswick Yard.

". . . .

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute waived hearing thereon.

"Numerous awards are cited by the parties on this claim. A careful analysis shows distinguishing features in the fact situations.

"Employe's service dates from 1915, injured in 1922, necessitating amputation of left foot below ankle. He continued work and in 1945 requested to take turn as passenger flagman, was given order to learn necessary territory, examined and passed by Carrier's physician. After making six trips ordered to return to Brunswick Yard. No explanation for change appears in the record.

"Carrier contends safety to traveling public necessitated action taken by reason of injury and age.

"If, as alleged, employe is obviously unqualified, there is no valid reason for failure to permit adequate proof of the fact, rather than reliance on an unproved conclusion.

"Employe worked with artificial appliance for 23

years. In cases involving managerial prerogatives, the exercise of that right must be reasonable.

"Six years have elapsed since trial runs were made. Restoration of requested service depends on ability to perform. If employe is still interested, he should be given proper consideration, based on competent medical standards.

"AWARD

"Claim sustained as per findings.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMENT BOARD
"ATTEST: (Sgd.) T. S. McFarland
"Executive Secretary

"Dated at Chicago, Illinois, this 20th day of February, 1951."

"Award No. 977
Docket No. 973

"NATIONAL RAILROAD ADJUSTMENT BOARD
"FOURTH DIVISION

"The Fourth Divison consisted of the regular members and in addition Referee Emmett Ferguson when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

"STATEMENT OF CLAIM: Request that A. B. Martin, Yardmaster, Shreveport, Louisiana, be permitted to return to service as yardmaster, and paid in the amount he would have earned had he been permitted to return to the service in keeping with his request October 1, 1952.

"....

"OPINION OF BOARD: There is one principal fact upon which the parties agree in this docket. That is, the claimant has suffered the loss of both legs, one above the knee and the other below the knee. There is no agreement whatever on the claimant's present ability to use his prosthetic appliances, or the percentage of his disability. The carrier, on the one hand, insists that a man with both legs amputated is unable to fulfill 100% of the duties of the job of yardmaster. The claimant's organization, on its side, urges strongly that a yardmaster's work is by definition supervisory and requires the barest minimum of actual walking. To exaggerate the case, it has been said by the Brotherhood that the claimant could run this particular job of yardmaster from a wheel chair. It has been explained that the yard in question is not a large one and that there are not many workers under this yardmaster's supervision; that most of the actual work of the yard is done on a switching lead directly in front of the yard office; and that, because of the excellent recovery of the claimant and his mastery of his artificial legs, he would be able to handle this particular job with no complications.

"On the other hand, the carrier insists that a yardmaster, to be qualified must be able to meet not only the ordinary operations of his post but must, if need arise, be able to handle any extraordinary situation which might require haste and direct action outside the yard office.

"The docket indicates that the claimant herein was provided a settlement of his personal injury claim against the carrier, but the terms of the settlement have not been brought before this Board. Accordingly, we refuse to conjecture about any claims made, assurances given, or obligations remaining on the part of either of the parties to that settlement.

"The Organization further urges that the claimant should be given an opportunity to demonstrate his yardmaster ability by actually working the job and the carrier declined to restore him to work because it was certain in advance that the claimant would not be able to function properly and safely.

"The organization cites a comment by the company physician addressed to the claimant to the effect that he saw no reason why the claimant could not return to work as a yardmaster. We hesitate also to intrude in the relation between physician and patient, because it must certainly be true that it is a physician's duty to restore the confidence of one as seriously injured as the present claimant.

"Finally, we note that the carrier did on January 18, 1954, seriously consider the organization's request for an inspection of the claimant and his ability to use his artificial limbs; and that the claimant did not refuse such in-

spection, but preferred to be represented at the demonstration by his organization.

"From all of this it appears that both the organization and the carrier have been protecting their respective positions so well that the injured man has been forced to present his case here without being able to show his actual skill in getting about. This Board is of the opinion, therefore, that it would be unwise to order the claimant back to work while a doubt still exists. The important thing is that both the organiation and the carrier should, in fairness and impartiality, try to salvage the individual whose willingness in the face of adverse circumstances should be encouraged so long as he is able to do his job completely and without danger to himself and others. We note that the job he seeks is that of extra yardmaster, which would likely require his use on all three shifts, which is a further complicating factor. At this time this Board refuses to sustain the claim advanced, but recommends to the parties that a demonstration of the claimant's fitness and ability be arranged off the property, preferably with competent, disinterested, medical advice; and an appraisal of his fitness and ability be fairly arrived at by the parties themselves.

"FINDINGS: The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute waived right of appearance at hearing thereon.

"AWARD

"Claim denied with recommendations.

"NATIONAL RAILROAD
ADJUSTMENT BOARD

"By Order of Fourth Division
"ATTEST: R. B. Parkhurst
Secretary

"Dated at Chicago, Illinois, this 4th day of June, 1954."

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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 313

BERT SMITH,
Petitioner,

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III,
As Trustees of the Property of Florida East Coast
Railway Company, a Florida Corporation,
Respondents.

PETITIONER'S REPLY BRIEF

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IN THE

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J. TURNER BUTLER and WILLIAM A. HALLOWES, III,
As Trustees of the Property of Florida East Coast
Railway Company, a Florida Corporation,
Respondents.

PETITIONER'S REPLY BRIEF

Several contentions advanced by respondents should not pass unnoticed.

Respondents claim that the record of the first trial was held inadmissible at the second trial "for the reason that petitioner had failed to show a substantial reason why the original witnesses were not produced." (Respondents' Brief, Page 4). Respondents have misread the record. The trial judge held the proffered testimony was in proper form but that the evidence was inadmissible because of the appellate holding that there "was no justiciable issue, at least

under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test." 104 So.2d 869. It would have been an idle ceremony to require the jury to hear three days of testimony which the appellate court had already held did not create a jury question. The matter is explicitly ruled on at R. 568:

> "MR. DANIELS: Maybe I didn't understand. I thought you held that we could not proffer it.
>
> THE COURT: No, I let you proffer it and I just excluded the proffer.
>
> MR. DANIELS: Oh, you accept it as a proper proffer, but you hold that it is inadmissible?
>
> THE COURT: That's right."

Respondents are also in error in claiming that petitioner has wholly abandoned his claim "that respondents were negligent in requiring petitioner to take the test, knowing of his likelihood of injury because of petitioner's physical condition." (Respondent's Brief, Page 2). The only reason this allegation was abandoned was that it was included in the original allegation that respondents were at fault "In negligently and unlawfully requiring the plaintiff to participate in such a 'field test' " (R. 2).

It is not deemed necessary to discuss or attack respondents' incorrect factual allegations regarding the reasons for and the circumstances of requiring petitioner to take the field test. The appellate holding in this case did not review the record and find no evidence of negligence. The appellate holding was, that no matter what the evidence, an FELA plaintiff did not create a "justiciable issue" by alleging negligence:

> "a. In negligently and unlawfully requiring the plaintiff to participate in a 'field test';

b. In negligently allowing its servants, agents or supervisors to conduct such a 'field test;'" (R. 2).

Without regard to the evidence, the holding below was:

> "* * * There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U.S.C.A., Sec. 151, et seq. Consequently, we do not consider that items 1 and 2 under the charge of negligence, supra, constituted triable issues. * * *" 104 So.2d at 869-870.

The opinion below to the contrary notwithstanding it is impossible for this to be a labor relations matter under the Railway Labor Act. Petitioner is totally and permanently disabled and has no capacity to labor or have labor relations. The issue is whether respondents can use the Labor Act as a shield to avoid payment for injuries caused by their negligence.

Respectfully submitted,

.....

WILLIAM S. FRATES,
Attorney for Petitioner.

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JAMES R[illegible], Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 313

BERT SMITH,
Petitioner,

v.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III,
As Trustees of the Property of Florida East Coast
Railway Company, a Florida Corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR THE PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 313

BERT SMITH,
Petitioner,

v.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III,
As Trustees of the Property of Florida East Coast Railway Company, a Florida Corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The first opinion (R. 325-329) of the District Court of Appeal of Florida, Third District, is reported at 104 So. 2d 868. The second opinion (R. 368-369) by the same court is reported at 118 So. 2d 237. The order (R. 369) of the Supreme Court of Florida denying certiorari is reported at 122 So. 2d 402.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The judgment of the Third District Court of Appeal became final on May 13, 1960, when the Supreme Court of Florida denied certiorari and refused to take jurisdiction in the case (R. 369).

The petition for certiorari was filed in this Court on August 10, 1960. This Court granted the petition and transferred the case to the summary calendar on October 24, 1960 (R. 370).

STATUTES INVOLVED

The pertinent sections of the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. Sec. 51, *et seq.*, and the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. Sec. 151, *et seq.*, are set out in Appendix A.

QUESTION PRESENTED

Did the Florida Appellate Court err in holding that when a railroad employee sustains personal injuries while performing an alleged physical fitness field test ordered by the railroad that the provisions of the Railway Labor Act, 45 U.S.C. Section 151, *et seq.*, preclude him from claiming that the giving of such a test under the facts and circumstances of this case was an act of negligence under the Federal Employers' Liability Act, 45 U.S.C. Section 51, *et seq.*?

STATEMENT OF THE CASE

Petitioner, a railroad flagman, fell and received injuries which totally and permanently disabled him in 1956 (R. 82-86). The events leading to his downfall are unique.

In 1956, respondents urged petitioner to retire. He refused (R. 33-34, 59-60, 152). At that time, petitioner was sixty-one years old (R. 135); 5' 3" tall (R. 87); and weighed about 260 pounds (R. 78, 88). He had rendered respondents thirty-six years of continuous service without a single demerit (R. 39, 135, 142-143, 232-233). Although his stamina and agility were impaired by arthritis and his portly physique, he was declared physically "fit for duty as a flagman" by the railroad's local doctor in Miami in August of 1956 (R. 27-28). This medical opinion was shared by respondents' chief surgeon who exaamined petitioner on September 10, 1956 (R. 75-77).

Respondents did not acquiesce in petitioner's retirement refusal. On September 13, 1956, petitioner became the first employee ever required to take a physical fitness "field test" in the history of respondents' railroad (R. 32, 43-44, 66, 69, 74, 101). Respondents' supervisor who ordered petitioner to retire or take the test admittedly devised a test which he believed petitioner was physically unable to perform (R. 65, 67-68).

The "field test" in question required the 260 pound petitioner to walk a mile of track on a hot, humid day (R. 103, 119-120, 158-159) at a place described by one of respondents' conductors as follows:

> "They could have picked the whole railroad and never have picked a worse spot to have had a man walk than they did." (R. 247).

The portion of the track selected was littered with pieces of wire and covered with rocks and weeds (R. 247-248, 160). After walking some 1,000-1,500 feet, petitioner became entangled in a piece of wire and fell (R. 102, 115-116, 138). During the next 1,500 feet, he fell a second time on more wire; and finally fell a third time to rise no more (R. 102-103, 138-139). Even though petitioner was rushed to a doctor and received immediate medical attention (R. 103-104), the series of falls rendered him totally and permanently disabled (R. 82-86).

Petitioner sued respondents under the FELA setting out eight separate allegations of negligence (R. 1-2). The first two allegations of negligence were:

> "a. In negligently and unlawfully requiring the plaintiff to participate in such a 'field test';
>
> b. In negligently allowing its servants, agents or supervisors to conduct such a 'field test';" (R. 2).

The remaining six charges concerned failure to provide a reasonably safe place to work (R. 2).

At the trial, respondents contended that their right to give the test, or the manner in which it was given, could not be questioned in a FELA action and that petitioner could only complain of the matter in proceedings under the Railway Labor Act. The trial judge rejected this contention (R. 65-66, 187-189), and the case was tried accordingly.

Extensive evidence was offered tending to show that the railroad was negligent in requiring petitioner to perform the particular field test in question. Evidence was likewise introduced to show that the test was actually designed to force retirement rather than to determine petitioner's fitness as a flagman.

Among other things, petitioner's evidence showed that:

1. No other employee had ever been required to take such a test in the whole history of the railroad (R. 32, 44, 66, 73-74, 101);

2. For reasons best known to respondents, petitioner was told to either retire or take the test (R. 33-34, 59-60, 152). Until this ultimatum, respondents had always left questions of physical fitness to its medical department. A sick employee could not return to work until the medical department gave him a "fit for duty" slip called a "C. S. 1" (R. 25-26, 67-70); and respondents' supervisors could order a physical examination of any working employee whose fitness was questioned (R. 31-32). The supervisor who ordered the "field test" did not require petitioner to take a physical examination for the admitted reason that he knew the medical department considered petitioner fit for service (R. 34).

3. The particular test given was one which respondents' supervisor admittedly believed petitioner was physically unable to perform (R. 65, 67-68).

4. It was not necessary for flagmen, such as petitioner, to walk a mile in performing their duties and the field test devised was not a true test of a person's ability as a flagman (R. 18-22, 44-45, 51-52, 64-65, 225-228, 254-255).

After all the evidence was in, the trial resulted in a $30,000.00 jury verdict and final judgment for petitioner (R. 319-320). The exact scope and effect of petitioner's evidence need not be further detailed or discussed because of the holding on appeal—no matter what the evidence, petitioner could not question respondents' right to give

him the test. The District Court of Appeal, Third District, reversed petitioner's jury verdict and judgment with a holding that:

> "* * * There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U. S. C. A., Sec. 151 et seq. Consequently, we do not consider that items 1 and 2 under the charge of negligence, supra, constituted triable issues. * * *" 104 So.2d at 869-870.

The case was remanded to the trial court for retrial on the remaining six allegations of negligence. At this stage of the proceedings, the Florida appellate court's holding was not subject to review by this Court because no final judgment had been entered. *Lavender* v. *Kurn*, 329 U. S. 762; 28 U. S. C. Sec. 1257 (3).

The events which occurred on remand and on the second appeal of the case are succinctly summarized in the Third District Court of Appeal's second opinion in the case:

> "This cause appeared before this court upon a prior appeal. See Butler v. Smith, Fla. App. 1958, 104 So. 2d 868. Upon the return of the cause to the trial court pursuant to our mandate, the plaintiff elected to stand exclusively upon his claim, under the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51, et seq., that the railroad had no right to give the field test. The trial court entered judgment under authority of our prior opinion in this case. The plaintiff now appeals from this judgment. The only assignment of error presented is that the court erred in directing a verdict for the defendants. Appellant's brief recites 'The sole purpose of this appeal is to

obtain a record on which this court's prior decision in Butler v. Smith, Fla. App. 1958, 104 So. 2d 868, can be reviewed by the Supreme Court of the United States.'

'The judgment of the trial court is affirmed upon the authority of Butler v. Smith, supra.

Affirmed." (118 So. 2d 237).

After the Third District's affirmance of the directed verdict for respondents, petitioner sought review in the Supreme Court of Florida. The Florida Supreme Court denied certiorari on May 13, 1960.

SUMMARY OF ARGUMENT

The decision below is the first to hold that the Railway Labor Act limits the FELA concept of negligence. Such a holding is:

1. Contrary to all-inclusive wording used by Congress in the FELA;
2. Not supported by any language of the Railway Labor Act;
3. Contrary to the holding in the *Barnes* case and in conflict with one theory of recovery approved in the *Borkovic* case; and
4. Contrary to this Court's constant and established course of liberal construction accorded the FELA.

ARGUMENT

The theory that the Railway Labor Act limits the FELA concept of negligence originates with the decision below. No authority is cited to support this radical proposition for the simple reason that none exists.

The unquestioned purpose of the FELA is to provide railroad employees a monetary remedy for personal injuries caused by the railroad's negligence. This purpose is expressed in the following words:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ." (45 U.S.C. Sec. 51).

Until the decision below, it was equally unquestioned that the only purpose of the Railway Labor Act was to establish policies and machinery for the peaceful settlement of labor disputes. The Congressional purpose is stated in the Act as follows:

> "The purposes of the chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly

settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." 45 U.S.C. Sec. 151(a).

The language Congress used affords no possible support for the holding below that:

". . . There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U.S.C.A. §151 et seq. Consequently we do not consider that items 1 and 2 under the charge of negligence, supra, constituted triable issues. . . ." 104 So. 2d 869-870.

The suggestion that petitioner should seek redress under the Railway Labor Act for the damages caused by the improper field test is unsound advice. The Railway Adjustment Board does not have the power to award damages for tortious conduct. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239. Cf. *Union Pacific Railroad Co.* v. *Price*, 360 U.S. 601.

Research discloses only one case where it was even contended that the Railway Labor Act limited the issues in a FELA case. In *Barnes* v. *Public Belt R. R. Commission* (E. D. La., 1951), 101 F. Supp. 200, a switchman was injured when a train made a sudden stop. He sued under the FELA. The railroad contended "that as to the claim for loss of time this Court is without primary jurisdiction." 101 F. Supp. 201. Judge Wright awarded plaintiff $306.00 damages for his lost wages and squarely rejected the railroad's contention with a holding that:

"Under Title 45, Section 51, United States Code Annotated, this court has jurisdiction of the claim by

plaintiff against his employer for damages suffered by him through the negligence of his employer. The Railway Labor Act, 45 U.S.C.A. §§151-188, has no application to a claim for damages to the employee resulting from the negligence of an employer railroad. Elgin, Joliet & Eastern Railway Company v. Burley, 325 U.S. 711, 734, 65 S. Ct. 1282, 89 L. Ed. 1886; Virginian Railway Company v. System Federation No. 40, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789; Order of Railway Conductors v. National Mediation Board, et al., 72 App. D. C. 299, 113 F. 2d 531." 101 F. Supp. 203

The Florida holding below is also contrary to the theory of recovery in *Borkovic* v. *Pennsylvania Railroad Company* (W. D. Pa, 1960), 180 F. Supp. 495. Plaintiff, an electrical lineman, recovered a $100,000.00 verdict for injuries received when he fell while climbing a transformer pole. In denying the railroad's post-trial motions, the Court held:

"At the trial plaintiff introduced evidence to establish that his accident was caused by negligence of the defendant in two respects: first, because the pole from which plaintiff fell was in an unsafe condition because it was 'pock-marked with holes' from previous climbing and also because it was not equipped with steps for climbing; and secondly, because plaintiff had been forced to climb the pole on the particular occasion under conditions of undue stress and pressure as a part of a 'time test' ordered by his supervisors for the purpose of attempting to disqualify a fellow lineman. . . .

* * *

Defendant's contention that the evidence was insufficient to support a finding that plaintiff's accident was caused by negligence of the defendant does not require extended discussion. It is true that the Federal Employers' Liability Act imposes liability only for negligence, and that the mere occurrence of an in-

jury to a plaintiff while employed by a railroad does not make the railroad liable. Inman v. Baltimore & Ohio R. Co., 80 S. Ct. 242; Wilkerson v. McCarthy, 1949, 336 U.S. 53, 61, 69 S. Ct. 413, 93 L. Ed. 497. But a review of the record in the instant case satisfies this Court that the evidence justified with reason the jury's conclusion that defendant's negligence played a part in producing plaintiff's injuries. Under the rule laid down by the United States Supreme Court in Rogers v. Missouri Pac. R. Co., 1957, 352 U. S. 500, 506, 77 S. Ct. 443, 1 L. Ed. 2d 493, no more is required to present a jury question under the Act. The defendant's motion for judgment under Rule 50 must therefore be denied.

MOTION FOR A NEW TRIAL

1. The Court cannot agree with defendant's contention that the jury's finding that plaintiff's accident was caused by any negligence of the defendant was against the weight of the evidence. Although the testimony was conflicting, there was ample evidence to warrant a finding of negligence, both because the pole from which plaintiff fell was unsafe for climbing and because plaintiff was subjected to unreasonable risk and danger by the conditions under which he was ordered to climb the pole. There was also sufficient testimony to justify a finding that either or both of these conditions were a proximate cause of the plaintiff's fall. . . ." 180 F. Supp. 497-498

Borkovic squarely holds that the stress and pressure created by a fitness test is a factor for consideration in determining negligence under the FELA. This should be contrasted with the holding below that the railroad's right to give the test could only be questioned by some unspecified proceeding under the Railway Labor Act.

If the problem is approached on a broader plane, it is readily apparent that the decision below is wholly out

of step with the objectives of Congress and the decisions of this Court. In another context (is silicosis an "injury"), this Court stated in emphatic terms that restrictive concepts are not to be read into the FELA:

> "The language is as broad as could be framed: 'any person suffering injury while he is employed'; 'such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier'; 'by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances,' etc. On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable. The wording was not restrictive as to the employees covered; the cause of injury, except that it must constitute negligence attributable to the carrier; or the particular kind of injury resulting.
>
> To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court." *Urie* v. *Thompson*, 337 U.S. 163, 181-182.

In the present case, petitioner satisfied both the trial judge and the trial jury that his injuries were caused, in whole or in part, by an improperly conducted "field test". Neither reason nor authority exists to justify the appellate holding below that the negligence involved and the damages sustained were matters which Congress made cognizable only under Railroad Labor Act proceedings.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A.

Statutes Involved.

The Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C., Section 51, provides:

"§51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE: DEFINITION OF EMPLOYEES.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employees; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such com-

merce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such comemrce and shall be considered as entitled to the benefits of this chapter."

The Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. Sec. 151 et seq., provides in pertinent part:

"§151a. GENERAL PURPOSES.

The purposes of the chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

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IN THE

Supreme Court of the United States

No. 313

BERT SMITH,

Petitioner,

v.

J. TURNER BUTLER and
WILLIAM A. HALLOWES, III,
as Trustees of the Property of the
FLORIDA EAST COAST RAILROAD COMPANY,
a Florida corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENTS

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IN THE

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J. TURNER BUTLER and
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as Trustees of the Property of the
FLORIDA EAST COAST RAILROAD COMPANY,
a Florida corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENTS

I. JURISDICTION

Petitioner has sought jurisdiction of this Court under the provisions of Title 28 U.S.C.A., Section 1257 (3). The Petition for Certiorari was granted by this Court and the case transferred to the summary calendar. (R. 370).

II. STATUTES INVOLVED.

The Statutes involved herein are the **Federal Employers' Liability Act**, 35 Stat. 65, as amended, 45 **U.S.C.**, Section 51, et seq., and the **Railway Labor Act**, 44 Stat. 577, as amended, 45 **U.S.C.**, Section 151, et seq.

III. QUESTIONS PRESENTED.

Respondents submit that the real questions submitted to this Court for determination are as follows:

FIRST QUESTION

WHETHER OR NOT THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, ERRED IN HOLDING THAT PETITIONER HAD NO CAUSE OF ACTION AGAINST RESPONDENTS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT FOR AN ALLEGED INJURY FROM A FALL SUSTAINED DURING THE COURSE OF A PROPERLY AUTHORIZED TEST GIVEN PETITIONER TO DETERMINE HIS QUALIFICATIONS TO PERFORM HIS REQUIRED DUTIES AS A FLAGMAN SOLELY UPON THE CLAIM THAT RESPONDENTS HAD NO RIGHT TO GIVE SUCH A TEST, PETITIONER HAVING EXPRESSED HIS ANXIOUSNESS TO PERFORM THE TEST, AND HAVING ABANDONED ALL CLAIMS OF NEGLIGENCE FOR FAILURE TO EXERCISE REASONABLE CARE IN FURNISHING A SAFE PLACE IN WHICH, AND EQUIPMENT WITH WHICH,

TO WORK, AND HAVING ABANDONED HIS CLAIM OF NEGLIGENCE AGAINST RESPONDENTS IN REQUIRING PETITIONER TO TAKE THE TEST, KNOWING PETITIONER WAS IN A WEAKENED PHYSICAL CONDITION?

SECOND QUESTION

WHETHER OR NOT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW BY CERTIORARI DECISION OF HIGHEST COURT OF STATE WHEN FEDERAL QUESTION WAS NOT NECESSARY TO DETERMINATION OF CAUSE IN STATE COURT AND JUDGMENT FOR RESPONDENTS IS ADEQUATELY SUPPORTED ON A NON FEDERAL GROUND?

IV. STATEMENT OF THE CASE.

References herein made to the original record and to the appendices of the parties will be prefaced by the following symbols:

"R" — for original Record

"R. App." — for Respondents' Appendix

Petitioner's Complaint contains eight separate allegations of negligence, which we quote (R. 2):

*"(a) In negligently and unlawfully requiring the plaintiff to participate in such a 'field test';

*"(b) In negligently allowing its servants, agents or supervisors to conduct such a 'field test';

"(c) In negligently furnishing the plaintiff a dangerous and unsafe location at or upon which to engage in such a 'field test';

"(d) In negligently furnishing to plaintiff a dangerous and unsafe place at or upon which to work;

"(e) In failing to use ordinary care in providing the plaintiff a reasonably safe place to work;

"(f) In failing to provide the plaintiff with a reasonably safe place to work;

"(g) In negligently failing to provide the plaintiff with proper equipment and safeguards in performance of his duties and in the participation in such a 'field test';

"(h) In failing to provide adequate supervision and instructions governing the conduct of said 'field test'."

The first two allegations of negligence seek, allegedly under the **Federal Employers' Liability Act**, to con-

*These allegations are the only ones remaining in this cause, all others having been abandoned by Petitioner.

test Respondents' **right** to give the test at all. (R. 2). The District Court of Appeal of Florida, Third District, held, on the first appeal, that Petitioner could not raise, under the **Federal Employers' Liability Act**, any issue as to the right of Respondents to give the test, but that if he were aggrieved by virtue thereof, his claim for grievance was exclusively under the provisions of the **Railway Labor Act**, Title 45 U.S.C.A., Section 151, et seq. (R. 325-329), the Court stating: (R. 327):

> " . . . There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U.S.C., §151 et seq. Consequently we do not consider that items 1 and 2 under the charge of negligence, supra, constituted triable issues. The real issue in the case, which was apparently forgotten, was whether the appellant provided a reasonably safe place for appellee to work or perform the duties assigned him. Seaboard Air Line R. Co. v. Gentry, Fla. 1950, 46 So.2d 485; Seaboard Air Line R. Co. v. Hardee, Fla. 1951, 54 So.2d 809."

The Florida Court held that the first two charges of negligence did not present triable issues. (R. 325-329). The cause was remanded for re-trial, because of the "emotional prejudice" engendered into the minds of the jury by Petitioner's counsel on "an immaterial issue" denying Respondents a "fair and impartial trial of their cause". (R.. 327-329)

Upon remand to the trial court, Petitioner refused to try the cause upon, and abandoned, the remaining six allegations of negligence, and elected to proceed solely upon the allegations predicated upon the right of Respondents to give the Petitioner a test at all, and, also, amended his Complaint to add a third allegation of negligence, to-wit: that Respondents were negligent in "requiring Bert Smith, knowing his physical condition, to take the field test." (R. 349, 350). Petitioner proffered the entire testimony in the first trial upon these issues, which proffer the trial court held inadmissible. (R. 369). The trial court directed a verdict for Respondents, and Final Judgment for Respondents was thereupon entered. (R. 362-364).

Upon appeal to the District Court of Appeal of Florida, Third District, from the Final Judgment entered upon the directed verdict for the Respondents, the judgment was affirmed upon the authority of the former decision of that Appellate Court. (R. 368, 369). It is to be emphasized that upon this second appeal to the Florida Appellate Court, Petitioner expressly abandoned the third allegation of negligence, which he made by amendment at the last trial (i.e. that Respondents were negligent in requiring Petitioner to take the test, knowing of his physical condition), and relied solely upon the original first two allegations of negligence. We quote from Petitioner's Brief, filed with the District Court of Appeal of Florida, Third District, on the second appeal (p. 3):

> "During the proceedings on remand, counsel for Mr. Smith were allowed to amend the complaint to add a third charge of negligence which the trial judge then held insufficient under this

Court's decision. (R. 541-555) However, in the interest of simplifying the issues we expressly abandon this third charge and present this appeal solely on the same two charges held insufficient on the first appeal."

Respondents feel it necessary to clarify some of the misstatements made by Petitioner in his Statement of the Case, as well as to supply some important facts reflected by the Record, which Petitioner has omitted.

As of September, 1956, the Petitioner had been working some thirty-six years on the Railroad, both as a flagman and as a baggageman, having worked the last five years almost exclusively as a flagman on a passenger train. (R. 135, 142, 143). He was then sixty-one years old, weighed about 262 pounds, having reduced his weight from 327 pounds, and was about 5 feet 3 inches tall. (R. 75, 87, 88, 135, 137). Since 1942, Petitioner had had trouble with arthritis (R. 173). His chronic obesity (R. 105, 172), added to his arthritic difficulties, because his heavy weight put more strain than ordinary upon his joints. (R. 185). His arthritis was getting progressively worse. (R. 171-173). In March, 1956, Petitioner consulted an orthopedic surgeon for arthritis in his left knee and was treated by him until May. (R. 182-184). He was confined and treated in the East Coast Hospital Association hospital in St. Augustine, Florida, from May 21st through June 30th, 1956, for arthritis and for a bladder infection. (R. 74). He returned home to Miami, where he received further treatment for his knee, and then returned to work on August 16, 1956. (R. 74, 75).

Although the Petitioner's work as a flagman is mos[illegible]y

occupied with inspecting the train, both prior to departure and while the train is in motion, his chief duty and the main purpose for his being on the train is, in the event of an emergency stop, to protect the rear of that train from other trains which may be approaching on the same track. (R. 143, 144). This must be done at all hours of the day or night, and regardless of weather conditions or anything else. (R. 60, 144). Under such circumstances, the Respondents' rules require (R. 57, 53):

> "When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fusees."

The flagman, by Petitioner's own admission, must go back at least as far as the last signal block (the signal blocks being about a mile apart), in order to flag the train (R. 19, 146), in the event the signal block might be inoperative (R. 221). Unless the train happens to stop right at one of the signal blocks, the flagman must go back even farther than the last signal block to flag an approaching train, since he is required to place two torpedoes on the track a sufficient distance back from his train that an approaching train on the same track will run over the torpedoes, explode them, and the engineer, hearing the explosion, can stop his train in time to avoid a collision. (R. 20, 21, 57, 58, 123, 124, 145, 146). This means he should go back at least a mile, since it would take a passenger train approximately a mile, traveling at the maximum speed permissible, to stop. (R. 45, 46). Even though an approaching train might be stopped in less than

a mile by an emergency application of the brakes, such stops are carefully avoided, if at all possible, in order to prevent injury to the many passengers on board. (R. 46). In addition to placing the torpedoes on the track, the flagman is required to drop lighted fusees, or flares, as additional warning to the approaching train. (R. 20-23, 57, 58). Petitioner, by his own testimony, admitted having walked a mile along the railroad track on various emergency occasions in order to protect the rear of his train in the course of his duties as a flagman. (R. 145, 147, 148).

After Petitioner's return to work, he was observed by Respondents' trainmaster, Mr. Clark, to be having difficulty both in getting on and off the train and in walking around the passenger trains to inspect the brakes—a visual brake inspection required of a flagman—which exhausted Petitioner. (R. 58, 59). From these observations, Mr. Clark felt that Petitioner was unable to "properly" perform the duties required of a flagman in an emergency situation. (R. 58, 59). Petitioner had been allowed by his local physician to return to work after treatment for his knee, but, as Mr. Clark stated, his physician had no facilities for conducting the test of a man's ability to perform his required duties, nor the opportunity for the observation of the man in the actual performance of his duties. (R. 24) Petitioner's physical examination by Dr. Lockwood in the East Coast Hospital Association Hospital on September 12, 1956, was for the represented purpose of obtaining a life insurance policy. (R. 75)

Mr. Clark, as trainmaster, was, under Respondents' rules, in "charge of the immediate train and yard service, of the movement of traffic *** and of the employees engaged therein," and, "responsible for the organization

of train crews and for the maintenance of an adequate force in the train service." (R. 53) Because of this responsibility, and his responsibility for the safety of the traveling public, Mr. Clark went to Petitioner, discussed with Petitioner his condition and ability to perform his duties, and asked Petitioner if he desired to retire. (R. 59, 60) Petitioner replied, no, that he anticipated working four or five more years. (R. 59, 60)

Mr. Clark then wrote to Respondents' general superintendent, I. E. Hamilton, advising him of his observations of Petitioner, and stating that should conditions arise requiring Petitioner to go to the rear of the train to flag, he did not feel Petitioner could do so properly. (R. 27, 53, 54, 58-60, 65, 66) Mr. Hamilton responded by authorizing a field test to be conducted to determine Petitioner's ability to adequately perform his required duties. (R. 26, 27, 54, 60, 66)

The actual field test was merely that which Petitioner's duty would require him to do so as to flag a train in an emergency condition (R. 20, 21, 57, 58, 123, 124, 145, 146), namely, walk a mile along the railroad track. (R. 40) This was a test which Respondents' officials had unquestioned (even by the General Chairman of the Brotherhood of Railway Trainmen) authority to give Petitioner. (R. 126-128) And, as to the propriety of the type of test to be given, the Brotherhood Chairman stated that it was the only kind of qualification test you could give a flagman. (R. 114, 155)

Petitioner has erroneously tried to give this Court the impression that no field test or efficiency test had ever been given by the Railroad to any other employee.

Although this was the first test given a flagman by Respondents, they had many times given efficiency tests in the field to various employees to determine their capability to properly do their job, including engineers and firemen. (R. 126, 127, 202) Such tests were given under what would be described as simulated emergency conditions. (R. 127)

Petitioner's statement that Respondents' supervisor "admittedly devised a test which he believed Petitioner was physically unable to perform" is not only a misstatement of fact, but calculated to mislead the Court to believe that someone deliberately sat down and devised some type of test which was impossible for anyone to pass, and which had no relationship to Petitioner's actual duties. The test, as above stated, was merely that which Petitioner's duties might at any time require him to do, and Mr. Clark's expressed belief was not that Petitioner could not possibly perform the test, but that he could not perform his required duties "properly". (R. 53, 54, 65, 67, 68) Petitioner expressed to Mr. Clark his anxiousness to perform the test as to demonstrate his ability to do his job properly. (R. 35)

Petitioner was advised he could have a representative with him at the test, and he brought with him both the Chairman of the Brotherhood of Railway Trainmen, Mr. Baumberger, and the General Chairman of the Order of Railway Conductors and Brakemen, Mr. Delk. (R. 35, 60) As far as the actual test is concerned, Mr. Clark and Mr. Johnson, Respondents' road foreman of engines, as representatives of the Railroad, and Mr. Delk and Mr. Baumberger, all participated in the test by walking the mile on the railroad track; Mr. Clark and Mr. Johnson

walked the entire distance in nineteen minutes, while Mr. Delk and Mr. Baumberger took twenty-three minutes. (R. 62, 102, 103, 115-120, 199) Petitioner proved Mr. Clark's prior observations of him to be accurate, and justified his fear that Petitioner was unable to properly perform his duties, by failing to complete the mile walk and actually covering only about 3,000 feet of the 5,280 feet distance, and taking thirty-two minutes to do that. (R. 69) While Petitioner sought to attribute his fall to water from gopherberry leaves on which he allegedly stepped, making his shoes slippery (R. 139), Mr. Delk attributed Petitioner's fall to utter exhaustion. (R. 241) Petitioner was the only one of the five men walking the mile who fell. (R. 160)

Petitioner's claim for damages was limited to an alleged aggravation of pre-existing arthritis in the left knee. (R. 83-85)

V. SUMMARY OF ARGUMENT.

The District Court of Appeal of Florida, Third Distrist, properly held that the Petitioner's first two allegations of negligence in his Complaint did not state claims cognizable under the Federal Employers' Liability Act, but were matters remediable, if at all, only under the Railway Labor Act, because:

1) Petitioner's first two allegations of negligence in his Complaint were directed to and questioned only the "right" of the Respondents to require Petitioner to take a field test to determine his qualifications to continue to perform his required duties.

2) The "right" of the Respondents to require the Petitioner to take a field test to determine his qualifications to continue to perform his required duties was a labor grievance over which the National Railroad Adjustment Board under the Railway Labor Act had exclusive jurisdiction.

3) When the National Railroad Adjustment Board under the Railway Labor Act has exclusive jurisdiction, no Court, State or Federal, has the power under the guise of any other Act to exercise jurisdiction.

4) If the Federal Employers' Liability Act were extended to cover claims contesting the "right" of an employer to require a field test, it would open the door to countless claims of damages for personal injury based upon nothing more by way of alleged negligence than the fact that an employee was injured while doing something in response to a proper order by his superiors.

5) The decision of the Florida Appellate Court was not necessary upon a federal question and there is an adequate non-federal ground which supports the decision, leaving this Court without jurisdiction of this cause.

VI. ARGUMENT.

FIRST QUESTION

WHETHER OR NOT THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, ERRED IN HOLDING THAT PETITIONER HAD NO CAUSE OF ACTION AGAINST RESPONDENTS UNDER THE FEDERAL EM-

PLOYERS' LIABILITY ACT FOR AN ALLEGED INJURY FROM A FALL SUSTAINED DURING THE COURSE OF A PROPERLY AUTHORIZED TEST GIVEN PETITIONER TO DETERMINE HIS QUALIFICATIONS TO PERFORM HIS REQUIRED DUTIES AS A FLAGMAN SOLELY UPON THE CLAIM THAT RESPONDENTS HAD NO RIGHT TO GIVE SUCH A TEST, PETITIONER HAVING EXPRESSED HIS ANXIOUSNESS TO PERFORM THE TEST, AND HAVING ABANDONED ALL CLAIMS OF NEGLIGENCE FOR FAILURE TO EXERCISE REASONABLE CARE IN FURNISHING A SAFE PLACE IN WHICH, AND EQUIPMENT WITH WHICH, TO WORK, AND HAVING ABANDONED HIS CLAIM OF NEGLIGENCE AGAINST RESPONDENTS IN REQUIRING PETITIONER TO TAKE THE TEST, KNOWING PETITIONER WAS IN A WEAKENED PHYSICAL CONDITION?

Petitioner's emotional play, which began with the trial jury and which is repeated in Petitioner's Petition for Writ of Certiorari and in his Brief filed with this Court, that Respondents were "out to get him" (Petitioner) is clearly unsupported by the record in this cause, as the test was not only within the admitted authority of Respondents to require, but was nothing more stringent than Petitioner's own job required him to do; and upon Petitioner's ability to properly perform his duties depended the lives of thousands of passengers and other employees of Respondents' railway. As regrettable as Petitioner's failure to pass the test and his fall may have

been, the giving of the test may well have resulted in the saving of many lives and property.

This emotional play and Petitioner's vivid description of the rocks and gopherberry leaves, etc., and of the details of the walk itself, as well as of his injuries, have no place in this proceeding before this Court, as Petitioner has expressly abandoned his allegations of negligence under the Federal Employers' Liability Act with respect to the alleged failure of Respondents to furnish him with a reasonably safe place in which, and safe equipment with which to work or take the test, which the Florida Appellate Court held to have raised justiciable issues, but which Petitioner declined to go to trial upon.

It is to be pointed out that the Petition for Writ of Certiorari and Petitioner's Brief have circumvented the real issue in this proceeding, to-wit: Whether or not the Respondents had the **right** to require Petitioner to take the test, which was the basis of Petitioner's first two allegations of negligence in the Complaint, and, in this Court, for the first time in this proceeding, now seeks to imply that Petitioner was traveling upon an allegedly improperly conducted field test. It is significant to point out that neither the first nor second allegation of negligence in the Complaint asserted that Respondents conducted the field test in a negligent or improper manner, but asserted that Respondents negligently required the Petitioner to participate in the test and negligently allowed its servants, agents or supervisors to conduct the test. (R. 2) Indeed, the Florida District Court of Appeal, in its first decision emphasized that Petitioner's first two allegations of negligence related to and questioned the

Respondents' **right** to require Petitioner to take the test when it stated (R. 327, 328):

> **"There was no justiciable issue, at lease under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test."**
>
> "...
>
> **"The appellee's entire case as reflected by this record conclusively indicates that it was premised upon the claim that appellant's conduct in requiring the appellee to take a field test was unlawful and that all of his injuries and damages resulted from such unlawful act."**

The Florida Appellate Court, in its second decision, to which the Petition for Certiorari is directed, again emphasized that Petitioner's first two allegations of negligence in his Complaint, upon which he elected to stand exclusively at the second trial, questioned only Respondents' **right** to give Petitioner the field test when it stated (R. 368):

> "This cause appeared before this court upon a prior appeal. See Butler v. Smith, Fla. App. 1958, 104 So.2d 868. Upon the return of the cause to the trial court pursuant to our mandate, the plaintiff elected to stand exclusively upon his claim under the Federal Employers' Liability Act, **that the railroad had no right to give the field test."**

That this was the effect of Petitioner's first two charges of negligence is admitted by Petitioner's acts at the second trial, after remand of the case to the trial court from the Florida District Court of Appeal, in amending his Complaint to add an additional allegation of negligence, to-wit: That Respondents were negligent in "requiring Bert Smith, knowing his physical condition, to take the field test." (R. 349-350) But, this additional allegation, made by amendment, was expressly abandoned by Petitioner in his Brief on the appeal taken by Petitioner to the District Court of Appeal of Florida, Third District, from the Final Judgment for the Respondents. (see page 6, supra). Thus, the sole claim left and upon which Petitioner solely relied for recovery was directed to the right of the Respondents to require Petitioner to take the test at all. This is confirmed by Petitioner's counsel in his statement at the pre-trial conference before the trial Court (R. 337):

> " . . . our whole position in this case is that requiring this fellow to take this test, and conduct this thing, was the negligence in the case and a violation of F.E.L.A."

The Florida District Court of Appeal quite correctly determined that such a claim was not cognizable to predicate liability under the Federal Employers' Liability Act, but, if a grievance, was remediable under the Railway Labor Act. Petitioner's argument that Respondents' theory of this case is that the Railway Labor Act limits the Federal Employers' Liability Act concept of negligence, demonstrates Petitioner's misunderstanding, not only of Respondents' position, but of the real question herein involved. The decision of the Florida Appellate Court de-

cided nothing but that the sole remaining allegations relied upon by Petitioner, relating to Respondents' right to give the test, were matters cognizable only under that Act in which the matter of railroad employees' ability to perform their job, and of requiring a field test to so determine, has always been cognizable—the Railway Labor Act. If the Federal Employers' Liability Act were extended to cover claims of the nature relied upon here by Petitioner, it would open the door to countless claims for personal injury, based upon nothing more by way of alleged negligence than the fact that an employee was injured while doing something in response to a proper order by superiors, which the employee decides afterward he will claim should not have been given at all. It would likewise place back in the laps of the Courts labor grievances—the very thing that the Railway Labor Act was designed to alleviate and avoid—under the guise of an F.E.L.A. damage claim. Such was not the intention of Congress, nor have the Courts held it to be so.

Respondents have quoted in the Appendix to this Brief pertinent provisions of the Railway Labor Act. (R. App. 1-11) Its purposes are set forth in Section 151-a, Title 45, U.S.C.A. (R. App. 1-2), and are stated by this Court in **Union Pacific R. Co. v. Price,** 360 U.S. 601, 3 L.Ed.2d 1460, 79 S.Ct.Rep.1351 (360 at p. 609):

"...

"The purpose of the Railway Labor Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees to 'insure to the public continuity and efficiency of interstate transportation service,

and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies.' HR.Rep. No. 328, 69th Cong. 1st Sess. p, 1. . ."

The Railway Labor Act was specifically "passed to aid in solving problems which arise out of the relation of employer and employee engaged in Interstate Commerce." **Brand** v. **Penn. R. Co.** (DC Ed.Pa.) 22 F.Supp.569. The Act establishes the National Railroad Adjustment Board and preseribes for its membership and for its jurisdiction over disputes arising out of "grievances or out of the application or interpretation of a grievance covering rates of pay, rules or working conditions." Title 45, **U.S.C.A.** Section 151-a, 153. The Act "clearly includes within the term 'grievance' a dispute between the individual employee and the carrier." **Thomas** v. **New York, Chicago & St. Louis R. Co.** (CCA 6 Cir. 1950) 185 F.2d 614, 616. The Railway Labor Act also sets up the National Mediation Board, prescribes its membership and defines its jurisdiction, which, essentially, extends over matters not within the jurisdiction of the National Railroad Adjustment Board.

Since the passage of the Railway Labor Act, one of the classic fields in which the National Railroad Adjustment Board has exercised its conferred jurisdiction, on so many occasions, has been that involving disputes between the individual employee and the employer, with respect to the employee's ability and competency to perform the duties of his employment, in view of his physical condition, as well as the manner in which same should

be determined. Several of such disputes presented to and adjudicated by the National Railroad Adjustment Board and over which that Board expressly avowed jurisdiction, are reflected in the pertinent excerpts from some of such published Awards of the Board, incorporated in the Appendix to this Brief. (R. App. 11-40). The Board has, in innumerable instances, made its determination and award based upon the results of a field test ordered by the Board to be given the employee, E.g., Award No. 6202, First Division (R. App. 11-14); Award No. 6383, First Division (R. 14-16); See also Award No. 8394, Third Division; Award No. 977, Fourth Division; Award No. 12882, First Division; Award No. 14218, First Division; Award No. 14281, First Division; Award No. 1103, Fourth Division; Award No. 17523, First Division (R. App. 16-40). It has also confirmed the right of the employer to conduct field tests to determine the physical qualifications of its employees to perform their required duties. Award No. 8394, Third Division (R. App. 33-36). And, as stated by the Board in Award No. 17523, First Division:

"It is the undoubted perogative of management to determine the physical qualifications of its employees . . ." (R. App. 32).

Petitioner's statement on page 9 of his Brief that the National Railroad Adjustment Board does not have the power to award damages for tortious conduct is out of place and misses the point. It cannot be validly contended that the "right" to give Petitioner a field test involves tortious conduct. In case of **Greenwood v. Atcheson, Topeka & Santa Fe Ry. Co.** (DC S.D. Calif. 1955), 129 F. Supp. 105, the Court held as a matter of law that plaintiff had no cause of action under any of the provisions of the Federal Employers' Liability Act for an alleged wrongful dis-

charge of the plaintiff by the defendant, the Court stating (129 F. Supp. at p. 107):

"...

"... The liability created by the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., is a liability on the part of the employer to the employee for death or injury resulting in whole or in part from the *negligence* of any of the officers, agents or employees of the carrier, or from defects in appliances, etc., due to its negligence. There is no 'liability' created to continue a man in the carrier's employment" [Italics by the Court]

The principle of the **Greenwood** case is analagous here, since not only does the Federal Employers' Liability Act create no liability to continue a man in the carrier's employment, but it creates no liability upon the carrier for exercising its right to determine an employee's qualifications to continue to perform his required duty by giving him a qualification test.

Petitioner's sole remaining claim in this cause is one which historically has always been considered a labor grievance over which the National Railroad Adjustment Board, under the Railway Labor Act, has exclusive jurisdiction. When the Board has jurisdiction, no Court, State or Federal, has the power, under the guise of any other Act, to invade same. **Slocum** v. **Delaware L. & W. R. Co.** (1950) 339 U.S. 239, 70 S. Ct. Rep. 577, 94 L. Ed. 795; **Order of Ry. Conductors of America** v. **Southern Ry. Co.**, 339 U. S. 255, 70 S. Ct. Rep. 585, 94 L.Ed.2d 811; **Penn-**

sylvania R. Co. v. Day (1959), 360 U. S. 548, 79 S. Ct. Rep. 1322, 3 L.Ed.2d 1422.

In the **Slocum** case, this Court stated (339 U.S. at pp. 243, 244):

> " . . .
>
> "The paramount importance of having these chosen representatives of railroads and unions adjust grievances and disputes was emphasized by our opinion in Order of Conductors v. Pitney, supra. There we held, in a case remarkably similar to the one before us now, that the Federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents * * *.' Our ground for this holding was that the court 'should not have interpreted the contracts * * *' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U.S. at pages 567-568, 66 S. Ct. at page 325, 90 L. Ed. 318. **This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act.**" [Emphasis supplied]

The doctrine of **exclusive primary jurisdiction** in the National Railroad Adjustment Board applies even though the employee may have retired from service and terminated the employer-employee relationship " . . . **if the**

claim arises out of the employment relationship which Congress regulated." **Pennsylvania R. Co. v. Day**, supra (360 U.S. at p. 552). This Court there said (360 U.S. at pp. 552, 553):

> " . . . The purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated. The Board itself has accepted this construction and adjudicates the claims of retired employees.[2] This uniform administrative interpretation is of great importance, reflecting, as it does, the needs and fair expectations of the railroad industry for which Congress has provided what might be termed a charter for its internal government. Moreover, the discharged employee may challenge the validity of his discharge before the Board, seeking reinstatement and back pay. See Union Pacific R. Co. v. Price, infra, p. 1460. Thus it is plain both from a reading of the Act in light of its purpose and the needs of its administration and from the settled administrative interpretation that the Board has jurisdiction over respondent's claim for compensation.
>
> "Since the Board has jurisdiction, it must have exclusive primary jurisdiction. All the considerations of legislative meaning and policy which have compelled the conclusion that an active employee must submit his claims to the Board, and may not resort to the courts in the first instance, are the same when the employee has retired and seeks compensation for work performed while he remained on active service. A

contrary conclusion would create a not insubstantial class of preferred claimants.[3] Retired employees would be allowed to bypass the Board specially constituted for hearing railroad disputes whenever they deemed it advantageous to do so, whereas all other employees would be required to present their claims to the Board. This case forcefully illustrates the difficulties of such a construction. Several active workers have had claims similar to that of respondent rejected by the Board. To allow respondent now to try his claim in the District Court would only accentuate the danger of inequality of treatment and its consequent discontent which it was the aim of the Railway Labor Act to eliminate. . . ."

This Court has also held that in the event of any conflicts between the provisions of the Railway Labor Act and other statutes, State or Federal, the specific provisions of the Railway Labor Act shall predominate and exclusively apply. **Brotherhood of Railroad Trainmen** v. **Chicago River & Indiana R. Co.** (1957) 353 U.S. 30, 1 L.Ed. 2d 622, 77 S. Ct. 635, rehearing denied 353 U.S. 948, 77 S. Ct. Rep. 23, 1 L.Ed.2d 857; **State of California** v. **Taylor** (1957) 353 U.S. 553, 77 S. Ct. Rep. 1037, 1 L.Ed.2d 1034.

Neither the cases of **Barnes** v. **Public Belt Railroad Commission** (DC E.D. La. 1951) 101 F. Supp. 200, or **Borkovic** v. **Penn. R. Co.** (W.D. Pa. 1960), 180 F. Supp. 495 (cited by Petitioner), have any applicability to the instant case or the issue here involved. The **Barnes** case simply involved an action for damages under the Federal Employers' Liability Act for injuries sustained by a switchman who fell from the top of a car of a train which, it

was alleged and proved, negligently made an unexpected and unnecessary emergency stop. Plaintiff's claim for lost wages due directly to the result of his injury from defendant's negligence was held to be, as it always has been recognized, an item of damages incident to the claim for injuries under the Federal Employers' Liability Act. In the **Borkovic** case plaintiff was not injured while in the conduct of a test to determine his own qualifications, nor was any issue raised as to defendant's "right" to give the test in which plaintiff's fellow employees' qualifications were being determined. Nor was any contention advanced by the defendant that any of the plaintiff's asserted claims under the Federal Employers' Liability Act were cognizable only under the Railway Labor Act.

The language of the Court in **Urie** v. **Thompson**, 337 U.S. 163, 181, 182, quoted by Petitioner on Page 12 of his Brief, gives no solace to his position. The holding of the Florida Appellate Court that the allegation questioning the "right" of Respondents to require Petitioner to take a field test to be a labor grievance cognizable only under the Railway Labor Act, certainly places no restrictive covenants upon the provisions of the Federal Employers' Liability Act with respect to the employees covered, the cause of injury or the kind of injury resulting. Petitioner had six remaining allegations of negligence, which the Florida Appellate Court held were cognizable under the Federal Employers' Liability Act, but upon which Petitioner refused to proceed to trial.

SECOND QUESTION

WHETHER OR NOT THE SUPREME COURT OF THE UNITED STATES HAS JURISDIC-

TION TO REVIEW BY CERTIORARI DECISION OF HIGHEST COURT OF STATE WHEN FEDERAL QUESTION WAS NOT NECESSARY TO DETERMINATION OF CAUSE IN STATE COURT AND JUDGMENT FOR RESPONDENTS IS ADEQUATELY SUPPORTED ON A NON FEDERAL GROUND?

After remand of this cause by the Florida Appellate Court to the trial court on the first appeal, for re-trial upon the remaining six allegations of the Plaintiff's Complaint, the cause came on for trial, at which time Plaintiff elected to proceed only upon the first two allegations of negligence contained in the Plaintiff's Complaint, which the Florida Appellate Court had held not to present justiciable issues under the Federal Employers' Liability Act, and abandoned the remaining six allegations of negligence which related to the alleged failure of Respondents to exercise reasonable care to provide Petitioner with a safe place in which, and equipment with which, to work and take the test and the alleged failure of Respondents to provide adequate supervision and instruction in the conduct of the test. (R. 345, 346, 349, 350). Instead of actually trying the cause and presenting testimony on those two remaining allegations of negligence, Petitioner sought to proffer, upon the sole two remaining allegations of negligence, the written transcript of the entire testimony of the first trial without any showing that the witnesses who had testified in the former trial were unavailable or unable to appear at the second trial, over the strenuous objection of the Respondents. (R. 344, 345, 347-360). The trial court held the proffer "inadmissible". (R. 360).

Respondents' objection to the proffer and the form

thereof were twofold: (1) That the majority of the testimony of the former trial related solely to the remaining six allegations of negligence in Petitioner's Complaint, which Petitioner expressly abandoned at the second trial, after remand from the appellate court, whereas the second trial was upon that issue only, raised by the first two allegations in the Complaint, as to the "right" of Respondents to require Petitioner to take the test; (2) That Section 92.22 of the **Florida Statutes** prohibited the use of evidence adduced at a former trial unless the issues were substantially the same in both trials and unless a substantial reason be shown why the original witness or document was not produced. (R. 348-360).

The court properly held the proffer of the transcript of the entire testimony of the former trial inadmissible, since of the almost five hundred pages of testimony offered at the former trial, only a small portion related to the first two allegations of negligence, which the Florida Appellate Court held not to present triable issues under the Federal Employers' Liability Act, and it was not encumbent upon the trial court, nor the Florida Appellate Court, to sift through almost five hundred pages of testimony to ascertain which particular portion were material to the issues upon which Petitioner elected to go to trial upon. In addition, Section 92.22 of the **Florida Statutes** provides:

> "In the event it be made to appear to the satisfaction of the court that any evidence used at a trial of a civil case, whether oral or written, and incorporated in a bill of exceptions, or incorporated in the record proper can not be had, then the bill of exceptions taken at the trial, or

> the evidence incorporated in the record of the trial, may be used as evidence upon any subsequent trial or hearing of the case, or in any other civil cause or civil proceeding, as to any matter in issue at a previous trial or hearing; and, further, in the event that such evidence is not so preserved as before stated, then the same may be used at a subsequent trial or hearing, or in any other civil cause or civil proceeding involving substantially the same issue; if (1) such evidence has at such former trial been reported stenographically or reduced to writing in the presence of the court; (2) that the party against whom the evidence is offered, or his privy, was a party on the former trial; (3) **that the issue is substantially the same in both cases**; (4) **that a substantial reason is shown why the original witness or document is not produced**; and (5) that the court is satisfied that the report of such evidence taken at such former trial is a correct report.

The issues were not substantially the same, since the issues raised by the last six allegations of negligence in Petitioner's Complaint were abandoned at the second trial, and furthermore, the Florida law required that **a party seeking to introduce the testimony given at a former trial must first introduce preliminary evidence of the existence of the reasons for its introduction. Habig** v. **Bastian,** 117 Fla. 864, 158 So. 508. Petitioner produced no preliminary evidence to show a substantial reason why the original witnesses who testified in the former trial were not available and could not be produced.

The law is well settled by the decisions of this Court that unless a decision upon a Federal question was actually necessary to the judgment, this Court will not entertain jurisdiction, and even when an erroneous decision upon a Federal question is made a ground of the judgment, if the judgment is also supported upon another ground which is adequate by itself, and which contains no Federal question, this Court will likewise not entertain jurisdiction. **Arkansas Southern Railroad Company** v. **German National Bank** (1907) 207 U.S. 270, 28 S. Ct. Rep. 78, 52 L. Ed. 201; **Southwestern Bell Telephone Co.** v. **State of Oklahoma** (1938) 303 U.S. 206, 58 S. Ct. Rep. 528, 82 L. Ed. 751. In the **Southwestern Bell Telephone** case, this Court stated (303 U.S. at pp. 212, 213):

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U.S. 216, 234, 8 S.Ct. 1053, 32 L.Ed. 125; Johnson v. Risk, 137 U.S. 300, 306, 307, 11 S.Ct. 111, 34 L.Ed. 683; Wood Mowing & Reaping Machine Co. v. Skinner, 139 U.S. 293, 295, 297, 11 S.Ct. 528, 35 L.Ed. 193; Whitney v. California, 274 U.S. 357, 360, 361, 47 S.Ct. 641, 642, 643, 71 L.Ed. 1095; Lynch v. New York, 293 U.S. 52, 54, 55 S.Ct. 16, 17, 79 L.Ed. 191."

There being an adequate non Federal ground to support the judgment of the Florida court for the Respondent, and a decision of the Federal question not being necessary to the determination of this cause, this Court is without jurisdiction to entertain the Petition for Writ of Certiorari, and the Writ should be discharged.

VII. CONCLUSION.

There is nothing here involved except an attempt on the part of Petitioner to convert a labor grievance into a basis for liability under the Federal Employers' Liability Act. Petitioner refused to proceed to trial on what the Florida Appellate Court held to be triable issues under the Federal Employers' Liability Act, and if Petitioner ever had any possible claim under the Federal Employers' Liability Act, with respect to the manner of giving the test, it was lost when Petitioner expressly abandoned his oral amendment to his Complaint, made after the remand of this cause to the trial court for a re-trial, to the effect that Respondents were negligent in ordering the test when they knew Petitioner was in a weakened physical condition. The right to give the test or require the test, being the sole issue upon which Petitioner elected to stand, clearly presented no justiciable issue under the Federal Employers' Liability Act, but was correctly held by the District Court of Appeal of Florida, Third District, to be a matter cognizable only under the Railway Labor Act. This case involves no new or novel principle of law and certainly conflicts in no way with any of the decisions of this Court or of any other Federal Court.

There being a non Federal ground which supports the judgment of the Florida court, and that court's de-

cision of the Federal question not being necessary to the determination of this cause, this Court is without jurisdiction to entertain the Petition for Writ of Certiorari, and to review the Judgment of the Florida Appellate Court.

Respondents respectfully submit that the Writ of Certiorari should be discharged and the judgment of the District Court of Appeal of Florida, Third District, affirmed.

Respectfully submitted,

HAROLD B. WAHL
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Jacksonville, Florida

and

E. F. P. BRIGHAM, of
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ATTORNEYS FOR RESPONDENTS
E. F. P. BRIGHAM

By _____
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, in compliance with Rule 33 of the Supreme Court Rules, a copy of the Brief of Respondents and Appendix to Brief of Respondents was served upon William S. Frates of Nichols, Gaither, Green, Frates & Beckham, Esqs., Attorneys for Petitioner, 1111 Brickell Avenue, Miami 32, Florida, by depositing same in a U. S. Mail Box with first class postage prepaid addressed to said counsel of record at his above post office address this 25 day of January, 1961.

E. F. P. BRIGHAM

IN THE

Supreme Court of the United States

No. 313

BERT SMITH,

Petitioner,

v.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III, as Trustees of the Property of the FLORIDA EAST COAST RAILWAY COMPANY, a Florida Corporation,

Respondents.

APPENDIX TO BRIEF OF RESPONDENTS

I.

PERTINENT PROVISIONS OF THE RAILWAY LABOR ACT, TITLE 45 U.S.C.A.:

"§ 151a. General purposes

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of em-

ployees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

§ 152. General duties—Duty of carriers and employees to settle disputes

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

"....

"§ 153. National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards

"First. There is established a Board, to be

known as the 'National Railroad Adjustment Board,' the members of which shall be selected within thirty days after June 21, 1934, ..."

" . . . .

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train-and-yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the

appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: **Provided, however,** That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties of either party to the dispute may certify that fact to

the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum

to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

" . . . .

"§ 154. National Mediation Board—Board of Mediation abolished; National Mediation Board established; composition; term of office: qualifications; salaries; removal

"First: The Board of Mediation is abolished, effective thirty days from June 21, 1934, and the members, secretary, officers, assistants, employees, and agents thereof, in office upon June 21, 1934, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this chapter had not been passed. There is established, as an independent agency in the executive branch of the Government, a board to be known as the 'National Mediation Board', to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. The terms of office of the members first appointed shall begin as soon as the members shall qualify, but not before thirty days after June 21, 1934, and expire, as designated by the President at the time of nomination, one on February 1, 1935, one on February 1, 1936, and one on February 1, 1937. The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the

term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in office shall constitute a quorum for the transaction of the business of the Board. Each member of the Board shall receive basic compensation at the rate of $15,000 per annum, together with necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the Board on business required by this chapter. No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board.

"All cases referred to the Board of Mediation and unsettled on June 21, 1934, shall be handled to conclusion by the Mediation Board.

"A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.

" . . . .

"§ 155. Functions of Mediation Board—Disputes within jurisdiction of Mediation Board

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty

days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

II.

EXCERPTS FROM AWARDS OF NATIONAL RAILROAD ADJUSTMENT BOARD:

"Award No. 6202
Docket No. 12112

"NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

"PARTIES TO DISPUTE:

"ORDER OF RAILWAY CONDUCTORS

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE TEXAS AND PACIFIC RAILWAY COMPANY

"STATEMENT OF CLAIM: Claim that Conductor-brakeman M. A. Hughes should be allowed to exercise his seniority as train bag-

gageman and should be paid for time lost account deprived of service from January 16, 1941, and subsequently until he is allowed to exercise his seniority as train baggageman.

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers, and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The evidence of record in this docket shows that Conductor-Brakeman Hughes voluntarily left respondent carrier's service, April 13, 1930, account physical disability, and has not been in railroad service since that time, although his seniority as conductor-brakeman-baggageman has been perpetuated on the roster. His physical disability is acknowledged by all parties concerned, but it is contended by petitioner that he should be given a field test to ascertain whether or not he is physically able to perform the duties of train baggageman, and, if so, be allowed to exercise his seniority in that capacity.

"Without regard to Paragraph (a), Articles 40-41 of respective agreements here in evidence, reading:

> " 'The proper performance of their duties will be considered satisfactory test of the physical ability of all employes now in service.' "

and without interpreting said rule or establishing precedent thereunder, the Division holds that in the instant case, the result of a practical field test of sufficient duration, under average service conditions, under observation of representatives of the respective parties to this dispute, should be an acceptable determination of claimant's qualifications for service as a train baggageman.

"It is accordingly held that complainant Hughes shall be permitted to exercise his seniority as train baggageman, without pay for any time lost, provided he shall qualify for such service by a practical field test of sufficient duration, under average service conditions, under observation of represenatives of the respective parties to this dispute, which test shall be promptly accorded him.

"AWARD.

"Claim disposed of per Findings.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMENT BOARD

"ATTEST: (Sgd.) T. S. McFarland
"Secretary

"Dated at Chicago, Illinois, this 11th day of November, 1941."

"Award No. 6383
Docket No. 13261

"NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

"The First Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS

"STATEMENT OF CLAIM: Claim of Yardman C. H. Hackler for time lost by reason of being deprived of service December 16, 1940, and on all subsequent dates until permitted to exercise his seniority as yard foreman and/or helper.

" . . . .

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"The Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"Article 2-(b) of the Yard Agreement provides that yardmen may exercise their seniority for permanent vacancies as switchtenders, their seniority as such to date from November 19 ,1919; but it does not provide that they shall thereby lose their seniority as yardmen. Therefore claimant was entitled to exercise his seniority as yard foreman and/or helper, subject, under the circumstances, to the demonstration of the proper performance of his duties, under Article 25-(a).

"Due to his rating of 50% permanent disability there is no presumption of his ability to perform the duties, and he is therefore not prima facie entitled to pay for the time lost. But he is entitled to a reasoanble field test, and upon demonstrating his fitness he is entitled: (1) to exercise his seniority as claimed; and (2) to receive pay for all time lost, with reduction for other wages received from the carrier, in the absence of proof that his condition was not materially worse when the field test should have been given.

"The evidence of record and the rules cited supported the claim, subject to the above conditions.

"AWARD

"Claim sustained in accordance with above Findings.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMENT BOARD

"ATTEST: (Sgd.) T. S. McFarland
"Secretary

"Dated at Chicago, Illinois, this 29th day of January, 1942."

"Award No. 12882
Docket No. 20814

"FIRST DIVISION

"NATIONAL RAILROAD ADJUSTMENT BOARD
39 South La Salle St., Chicago 3, Illinois.

"The First Division consisted of the regular members and in addition Referee George E. Bushnell when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE TEXAS AND PACIFIC RAILWAY COMPANY

"STATEMENT OF CLAIM: Claim of Conductor J. W. Rothwell, employed Fort Worth-Texarkana via Min-

eola Seniority district, that he should be allowed to exercise his seniority, first on position as passenger conductor, second on position as train Baggageman in accordance with his seniority rights and/or rights to service as such and his request dated October 3, 1944, and pay for time lost as results of his request being denied by Superintendent R. C. Parker, September 7, 1944 forward. (Carrier's File T-19172.)

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"The First Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"This claim arises out of the denial of claimant's request to be allowed to exercise his seniority, first as a passenger conductor, and second, as train baggageman. His injury while in service as a freight conductor on January 12, 1944 necessitated amputation of his left foot, and later a higher amputation. He received $11,500 in settlement of his claim and executed a release therefor on October 9, 1944. This release does not recite total or permanent disability nor does the record indicate that claimant asserted such a condition, hence it cannot be held that the statement was based on that contention.

"Prior to settlement for his injury, he verbally requested permission to exercise his seniority on September 6, 1944. This was denied orally by the superintendent on September 7, and again in writing on October 20, following claimant's formal written request on October 3.

"The Vice President on appeal held on December 13 that his 'injuries totally and permanently disabled him from performing any character of train service,' and that by his settlement he ceased to be an employe of the company.

"The carrier moved this Division to dismiss this ex parte submission on four grounds which may be summarized as follows:

"(1) The Division lacks jurisdiction in the premises under the Railway Labor Act.

"(2) The dispute, if any, arises out of an injury and not a grievance.

"(3) The claim is barred by the terms of the written release.

"(4) Claimant relinquished all employment rights upon execution of the release in the light of his knowledge of his permanent physical disqualification.

"Claimant also seeks 'pay for time lost as a result of his request being denied, * * *.'

"Decision is controlled by the language of the release. The rule heretofore followed is — if the release is broad

enough to include the release of any claim growing out of the loss of seniority rights, the claim will be denied. If the release is special and relates only to the accident, it cannot be said to constitute a release of seniority rights and the claim will be sustained. See Award No. 4931, Award No. 5299 (Summons). See also Award 8265 (Simmons), Carrier's dissent, and sustaining opinion therewith.

"Claimant was not, by the carrier's own admissions, separated from the service when he requested permission to exercise his seniority on September 6, 1944. His separation, if any was not effected, according to carrier's statement, until October 19, 1944. Hence the Division has jurisdiction. Nor did it lose jurisdiction by reason of the release, which is special in nature and confined to the injury. Claimant did not therein waive any seniority rights and only denied 'promise of employment,' and 'other agreement not herein expressed.'

"Under the interpretation to Award 8265, claimant should be 'reinstated to his former seniority standing.' His restoration to service must, however, depend upon his ability to perform that service. This cannot be determined on this record by this Division, but must abide the usual and customary practice on the property and under the terms of the working agreement.

"Nor, under the circumstances here disclosed, is claimant entitled to compensation until his ability to perform service is determined.

"AWARD

"Claim sustained, but only as to restoration to former seniority standing, and without prejudice to appropriate further action on the property, and also without payment for time lost.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMENT BOARD

"ATTEST: (Sgd) T. S. McFarland
"Executive Secretary

"Dated at Chicago, Illinois, this 26th day of July, 1949."

"Award No. 14218
Docket No. 23644

"FIRST DIVISION
"NATIONAL RAILROAD ADJUSTMENT BOARD
39 South La Salle St., Chicago 3, Illinois

"The First Division consisted of the regular members and in addition Referee Francis J. Robertson when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE NEW YORK CENTRAL RAILROAD COMPANY
—BUFFALO AND EAST

"STATEMENT OF CLAIM: Claim of C. E. Nellis, formerly employed as Yard Helper at Watertown for reinstatement to active service as switchtender with seniority unimpaired based on Schedule Articles 40 (m) and 62 of the Trainmen's Agreement.

"This submission further involves a claim for payment of all time lost and vacation allotment account illegally held out of service October 30, 1946, and all subsequent dates, when a junior man was used to fill a switchtender's position in Watertown Yard.

" . . . .

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"While employed as a yard helper in Carrier's Watertown Yard, claimant suffered an injury which resulted in the amputation of his left leg. He filed suit against Carrier and the same was amicably adjusted. Thereafter, he sought to displace a switchtender under a provision

of the applicable agreement which, among other things, in effect, provides that when incapacitated for the duties of a foreman or helper, such employes will have the right to displace any able-bodied switchtender who entered the service subsequent to January 1, 1919, and who is junior in service. He was denied displacement rights on the ground that he was not physically able to perform the duties of the position.

"The discipline or investigation rule has no application to the facts of record in this docket, despite employes' contention to the contrary.

"Primarily, judgment in selecting and maintaining competent personnel for the operation of the railroad rests with the Carrier. However, that judgment may not be arbitrarily or capriciously exercised so as to deprive an employe of the rights which his collective bargaining agreement affords. Here, it is not denied that in the presence of Carrier officials claimant exhibited considerable dexterity of locomotion unusual in one so handicapped. Yet, Carrier has taken the position, in effect, that solely because of the injury suffered, without physical examination at the time of attempting to exercise his displacement rights, claimant is physically incapable of performing the duties of the position for which he has applied.

"In accordance with the principles stated in the preceding paragraph we find that claimant should be afforded a physical examination by Carrier's medical department to determine his ability to discharge the duties of the involved switchtender position. If the employes are dissatisfied with the findings of the medical department, then claimant should be submitted to an examination by a

board of three competent physicians, selected one by the Carrier, another by the Organization, and the third by the two thus selected; their findings to be used as a basis for determining his competence to fill the position. If found qualified, he should be permitted to exercise his displacement rights in the position sought and reimbursed for wage loss suffered commencing from October 30, 1946, less earnings in outside employment.

"AWARD

"Claim disposed of as per Findings.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMENT BOARD

"ATTEST: (Sgd.) T. S. McFarland
"Executive Secretary

"Dated at Chicago, Illinois, this 25th day of January, 1951."

"Award No. 14281
Docket No. 23027

"FIRST DIVISION

"NATIONAL RAILROAD ADJUSTMENT BOARD
39 South La Salle St., Chicago 3, Illinois.

"The First Division consisted of the regular members and in addition Referee LeRoy A. Rader when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE BALTIMORE AND OHIO RAILROAD COMPANY

"STATEMENT OF CLAIM: Request of restoration of Trainman G. C. Stewart to passenger service.

"JOINT STATEMENT OF FACTS: In April, 1945, Trainman G. C. Stewart, who had been working in Brunswick Yard, made reuest on Trainmaster to take turn as passenger flagman. Pursuant with that request, he was given an order by Trainmaster J. F. Stevens, dated April 20, 1945 to learn the necessary territory. After being examined on the road by Trainmaster, he was then assigned as passenger flagman to trains nos. 11 and 2nd 8, which he worked for six round trips. On completion of the sixth trip he was relieved from passenger service and returned to Brunswick Yard.

"....

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute waived hearing thereon.

"Numerous awards are cited by the parties on this claim. A careful analysis shows distinguishing features in the fact situations.

"Employe's service dates from 1915, injured in 1922, necessitating amputation of left foot below ankle. He continued work and in 1945 requested to take turn as passenger flagman, was given order to learn necessary territory, examined and passed by Carrier's physician. After making six trips ordered to return to Brunswick Yard. No explanation for change appears in the record.

"Carrier contends safety to traveling public necessitated action taken by reason of injury and age.

"If, as alleged, employe is obviously unqualified, there is no valid reason for failure to permit adequate proof of the fact, rather than reliance on an unproved conclusion.

"Employe worked with artificial appliance for 23 years. In cases involving managerial prerogatives, the exercise of that right must be reasonable.

"Six years have elapsed since trial runs were made. Restoration of requested service depends on ability to perform. If employe is still interested, he should be given proper consideration, based on competent medical standards.

"AWARD

"Claim sustained as per findings.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMEN BOARD
"ATTEST: (Sgd.) T. S. McFarland
"Executive Secretary

"Dated at Chicago, Illinois, this 20th day of February, 1951."

"Award No. 977
Docket No. 973

"NATIONAL RAILROAD ADJUSTMENT BOARD
"FOURTH DIVISION

"The Fourth Division consisted of the regular members and in addition Referee Emmett Ferguson when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

"STATEMENT OF CLAIM: Request that A. B. Martin, Yardmaster, Shreveport, Louisiana, be permitted to return to service as yardmaster, and paid in the amount

he would have earned had he been permitted to return to the service in keeping with his request October 1, 1952.

". . . .

"OPINION OF BOARD: There is one principal fact upon which the parties agree in this docket. That is, the claimant has suffered the loss of both legs, one above the knee and the other below the knee. There is no agreement whatever on the claimant's present ability to use his prosthetic appliances, or the percentage of his disability. The carrier, on the one hand, insists that a man with both legs amputated is unable to fulfill 100% of the duties of the job of yardmaster. The claimant's organization, on its side, urges strongly that a yardmaster's work is by definition supervisory and requires the barest minimum of actual walking. To exaggerate the case, it has been said by the Brotherhood that the claimant could run this particular job of yardmaster from a wheel chair. It has been explained that the yard in question is not a large one and that there are not many workers under this yardmaster's supervision; that most of the actual work of the yard is done on a switching lead directly in front of the yard office; and that, because of the excellent recovery of the claimant and his mastery of his artificial legs, he would be able to handle this particular job with no complications.

"On the other hand, the carrier insists that a yardmaster, to be qualified must be able to meet not only the ordinary operations of his post but must, if need arise, be able to handle any extraordinary situation which might require haste and direct action outside the yard office.

"The docket indicates that the claimant herein was

provided a settlement of his personal injury claim against the carrier, but the terms of the settlement have not been brought before this Board. Accordingly, we refuse to conjecture about any claims made, assurances given, or obligations remaining on the part of either of the parties to that settlement.

"The Organization further urges that the claimant should be given an opportunity to demonstrate his yardmaster ability by actually working the job and the carrier declined to restore him to work because it was certain in advance that the claimant would not be able to function properly and safely.

"The organization cites a comment by the company physician addressed to the claimant to the effect that he saw no reason why the claimant could not return to work as a yardmaster. We hesitate also to intrude in the relation between physician and patient, because it must certainly be true that it is a physician's duty to restore the confidence of one as seriously injured as the present claimant.

"Finally, we note that the carrier did on January 18, 1954, seriously consider the organization's request for an inspection of the claimant and his ability to use his artificial limbs; and that the claimant did not refuse such inspection, but preferred to be represented at the demonstration by his organization.

"From all of this it appears that both the organization and the carrier have been protecting their respective positions so well that the injured man has been forced to present his case here without being able to show his actual

skill in getting about. This Board is of the opinion, therefore, that it would be unwise to order the claimant back to work while a doubt still exists. The important thing is that both the organization and the carrier should, in fairness and impartiality, try to salvage the individual whose willingness in the face of adverse circumstances should be encouraged so long as he is able to do his job completely and without danger to himself and others. We note that the job he seeks is that of extra yardmaster, which would likely require his use on all three shifts, which is a further complicating factor. At this time this Board refuses to sustain the claim advanced, but recommends to the parties that a demonstration of the claimant's fitness and ability be arranged off the property, preferably with competent, disinterested, medical advice; and an appraisal of his fitness and ability be fairly arrived at by the parties themselves.

"FINDINGS: The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute waived right of appearance at hearing thereon.

"AWARD

"Claim denied with recommendations.

"NATIONAL RAILROAD
ADJUSTMENT BOARD

"By Order of Fourth Division
"ATTEST: R. B. Parkhurst
Secretary

"Dated at Chicago, Illinois, this 4th day of June, 1954."

AWARD 17523
Docket 32053

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

PARTIES TO DISPUTE:

SWITCHMEN'S UNION OF NORTH AMERICA

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: "(1) Request that Oscar S. Simmons, formerly employed as yardman, Oakland Yard Western Division, and presently holding seniority rights as such on the Western Division, be allowed to exercise seniority on herder assignments.

"(2) Claim is made for compensation for all time lost since date requesting to be marked for service August 25, 1952."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claimant's right arm was amputated immediately below the elbow as a result of an accident while working as a yardman. He sought to exercise yardman's seniority on certain herder assignments which the carrier refused because of his physical disability. He claims payment for all time lost since August 25, 1952, the date his request for herder assignments was denied.

The claim is principally based on a letter agreement between the carrier and the trainmen's organization dated January 8, 1942, wherein three switch tenders at West Oakland Yard were re-classified to herder's positions and compensated accordingly. A provision of that agreement is that any vacancies in the positions mentioned will be filled by yardmen holding seniority on the Yardmen's Seniority Roster.

The carrier contends that the 1942 agreement dealt with a special situation and did not contemplate that vacancies in such jobs would be filled by physically disabled yardmen. Claimant argues that these positions have been filled for many years by three disabled employes who are

not required to participate in switching moves made by yard crews (such as is generally required of herders) and he is physically qualified to fill one of these positions.

The record shows that the three disabled employes covered by the 1942 letter agreement had worked these jobs as switchtenders for many years prior to 1942, and that they were re-classified as herders during World War II when there was a manpower shortage and increased business. It was provided that they would not acquire seniority as yardmen and were not subject to displacement as yardmen.

In the normal course of their duties, herders are required to get on and off engines and cars, couple and uncouple engines and cars, give signals and assist yard crews when not otherwise engaged in their normal work. The risk involved in such work is obvious and it is plain to be seen that a man without the use of both arms would be in a position of great danger to himself and to others working with him. The carrier was therefore warranted in refusing to permit claimant to work at the customary herder's assignment. We are also of the opinion that the record amply supports the carrier's position that claimant is not entitled to the benefits of the letter agreement of January 8, 1942. The parties were there dealing with a specific situation and we find no basis in that agreement for the contention that a physically disabled yardman is entitled as a matter of right to fill a vacancy in those assignments. It is the undoubted prerogative of management to determine the physical qualifications of its employes and the January 8, 1942 agreement affords no proper basis for implying that it thereby intended to surrender that right with respect to the three positions covered thereby.

Under applicable rules on this property, disabled yardmen are only given preference to vacancies in positions of switchtenders. No such vacancies were available and in lieu thereof the carrier offered claimant an opportunity to qualify as a towerman or clerk but he declined to do so. Since he is still carried on the seniority roster, it may be assumed that if he desires to do so, he will be given an opportunity to fill a position for which he is physically qualified.

AWARD: Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 18th day of June, 1956.

Award No. 8394
Docket No. SG-8341

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY

OPINION OF BOARD: Claimant entered Carrier's service as a Signalman in October 1944. On the basis of the physical examination given him at the time of employment, Claimant was disqualified by Carrier's Chief Surgeon on the ground of defective eyesight. The examination revealed Claimant's vision in left eye was 20/200, with correction not possible. His vision in right eye was 20/20 when corrected with lenses. The Assistant Engineer of Signals nevertheless urged that Claimant be hired, due to the prevailing shortage of personnel with signal experience such as Claimant possessed. The matter was referred to Carrier's General Manager, who granted permission to employ Claimant provided he passed a visual field test. He was given such test and passed "one hundred percent", according to the Chief Engineer's report. The field examination consisted of a daylight test with green, yellow and red flags and hand signal to be identified at distances of 800, 1400 and 2000 feet; and a night test using green, yellow, red and white lights at the same distances.

In July 1954 Claimant was given another medical examination which indicated left eye 20/200, with correction not possible; right eye 20/100, but 20/20 corrected. On the basis of these results another field test was recommended for Claimant, said test being given in October 1954, with the Local Chairman present. Carrier's report indicated Claimant failed to correctly identify certain colors at particular distances up to 2000 feet in both the day and night parts of the test. By letter dated December 13, 1954 Carrier notified Claimant he was being removed from service on the ground that he was not qualified to safely perform his duties as a Signalman. Carrier suggested he apply to the Railroad Retirement Board for an occupational disability annuity. Claimant did so, and was granted a full

disability annuity January 1, 1955. In the meantime, however, Organization's General Chairman had protested Claimant's removal from service and requested that another field test be given. Said test was administered in March 1955. Claimant made all of the proper identifications in the daylight part of the test. In the night part, however, he failed to properly distinguish certain colors at distances from 1000 to 1800 feet. Both the day and night portions of this repeat test were administered in the presence of the General Chairman and the Local Chairman.

This last test served to conform Carrier's findings with respect to the October 1954 test, insofar as Claimant's ability to distinguish lights of various colors at night is concerned. His duties as a Signalman included the operation of a motor car alone, day or night. The Organization does not contend Claimant correctly made all of the color identification in the last field test given him. It is urged, however, that his vision was not sufficiently faulty to warrant removal from his Signalman's job. During the progressing of this claim Carrier offered to restore Claimant to active service as an hourly rated gang Signalman where he would work with other employes and not be permitted to operate a motor car alone. The Organization made a counter proposal which Management was unwilling to accept.

The Carrier is charged with the responsibility of maintaining safe and efficient operation of its facilities. It has a heavy obligation to provide for the safety of its employes and of other persons entrusted to its care. In a matter such as the instant case, this Board should not set aside Management's judgment unless there is a showing of action that is arbitrary, capricious or evidentiary of

bad faith. No such showing is made by the record before us. Thus the claim must be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of THIRD DIVISION

Attest: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 10th day of July, 1958.

Award No. 1103
Docket No. 1101

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

PARTIES TO DISPUTE:

ASSOCIATED MARITIME WORKERS LOCAL NO. 1,

INTERNATIONAL ORGANIZATION MASTERS, MATES AND PILOTS INC.

BUSH TERMINAL RAILROAD COMPANY

STATEMENT OR CLAIM: (a) Unwillingness of Carrier to reinstate Floatman-Deckhand A. Dubetsky to his former position, after being discharged from the U. S. Public Health Service Hospital, Staten Island 4, N.Y.; wherefore that

(b) Said Floatman-Deckhand A. Dubetsky be reinstated to service; and that

(c) Said Floatman-Deckhand A. Dubetsky be reimbursed for all wages lost as of May 20th, 1955 until returned to service.

" . . .

OPINION OF BOARD: Claimant, Andrew Dubetsky, 57 years old, began working for the Carrier on the 27th day of December, 1938, 15 years and 2 months before his first heart trouble that took him out of service; the Claimant returned to work for Carrier the last time on the 18th day of October, 1954, worked for about nine days and returned to the hospital with a heart condition.

The record reveals that from October 27, 1954, to the 10th day of December, 1954, Claimant was a patient at the U. S. Public Health Service Hospital for his heart condition. On January 19, 1955, and on April 22, 1955, Claimant was examined by the doctors at the said hospital and was found to be unable to work. On the 23rd day of May, 1955, at the request of G. M. Smith, Superintendent of Yard and Marine Operations for Carrier, Claimant was examined by Dr. Barnard Goodman, Carrier's Physician, who reported Claimant was unfit for duty. On the 6th day of June, 1955, Claimant was again examined by Dr. Goodman, who reported Claimant still not acceptable for duty. Then on June 29, 1955, Claimant was examined by a neutral doctor who reported that Claimant could work at a desk job, but could not do a job other than that which "requires anything more than a very minimal degree of effort." Then on the 20th day of October, 1955, a Dr. Parrish pronounced Claimant fit for duty; on the 24th day of October, 1955, Dr. Goodman reported Claimant not fit for duty.

The claim is that Floatman-Deckhand A. Dubetsky be reinstated to service and be reimbursed for all lost time.

This Board is well aware of the firmly established and prevailing rule that Carrier is possessed with certain discretionatory powers in establishing and determining the fitness physically of its employes for service and that the exercise of those powers will not be disturbed in the absence of a clear affirmative showing that they have been exercised in an unreasonable, arbitrary and capricious manner, and that the Board does not in such circumstances substitute its judgment for that of skilled medical men.

Many, many cases have been remanded in this and other Divisions of the Railroad Adjustment Board for the reason that only Carrier's chosen medical men had examined the claimants, and the different opinions have set forth that was the reason for such remanding.

But in the instant case, Carrier called on its doctor and Claimant's doctor to choose a neutral doctor to examine Claimant, and the neutral doctor pronounced Claimant fit only for a desk job or very light duty.

It cannot be said that Carrier has been harsh or lacking in reasonable consideration for Claimant.

This Board cannot help but be very sympathetic to the Claimant and his most important problem, but neither can the Board be unmindful of the tremendous responsibility that rests upon Carrier where Claimant's life and the lives of others, are involved, to do everything in its power to protect those lives as well as its physical property. Not only does Carrier have a right to do so, it has grave duty to do so.

Therefore, this Board holds that Carrier's action in determining the physical fitness of Claimant for duty under competent medical evidence was not unreasonable, arbitrary or capricious, and the claim must be denied.

FINDINGS: The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute waived right of appearance at hearing thereon.

AWARD

Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: R. B. Parkhurst
Secretary

Dated at Chicago, Illinois, this 18th day of April, 1956.

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Office Supreme Court, U.S.
FILED
FEB 27 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. 313

BERT SMITH,
Petitioner,

v.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III,
As Trustees of the Property of Florida East Coast Railway Company, a Florida Corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

PETITIONER'S REPLY BRIEF ON THE MERITS

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 313

BERT SMITH,
Petitioner,

v.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III,
As Trustees of the Property of Florida East Coast
Railway Company, a Florida Corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

PETITIONER'S REPLY BRIEF ON THE MERITS

Respondents contend that this Court has no jurisdiction because the judgment below could have been (although it was not) based on an adequate nonfederal ground. They also contend that the decision below is correct on the facts.

1. This Court Has Jurisdiction

Respondents' jurisdictional argument is based on a misconception of both federal and Florida law. Respondents admit that the federal question was decided below;

but contend this Court lacks jurisdiction because the court below could have decided the case on an adequate state ground. This Court rejected the identical argument in *Grayson* v. *Harris*, 267 U.S. 352, 358:

> "* * * The rule that when the decision of a state court may rest upon a nonfederal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no application where, as here, the nonfederal ground might have been considered by the state court but was not. Rogers v. Hennepin County, 240 U.S. 184, 188, 189, S.Ct. 217, 60 L. Ed. 469; Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 608, 19 S.Ct. 553, 43 L.Ed. 823. * * *."

The *Grayson* case is followed in *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192; and in *Stroble* v. *State of California*, 343 U.S. 181, Cf. *Gant* v. *City of Oklahoma City*, 289 U.S. 98.

Respondents' argument is equally invalid under Florida law. The trial judge rejected respondents' claim that the proffered testimony was not in proper form, and the Florida appellate court did not even deem the point worthy of discussion. The trial judge held the proffered testimony was in proper form but that the evidence was inadmissible because of the appellate holding that there "was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test." 104 So.2d 869. It would have been an idle ceremony to require the jury to hear three days of testimony which the appellate court had already held did not create a jury question. The matter is explicitly ruled on at R. 360:

> "MR. DANIELS: Maybe I didn't understand. I thought you held that we could not proffer it.

THE COURT: No, I let you proffer it and I just excluded the proffer.

MR. DANIELS: Oh, you accept it as a proper proffer, but you hold that it is inadmissible?

THE COURT: That's right."

Florida, like most jurisdictions, requires a proffer of excluded evidence so that the reviewing court can determine whether the proffered evidence was material and its exclusion was harmful. E.g. *Andrews* v. *Cardozo*, (Fla. App. 1957) 97 So.2d 43; *Montgomery* v. *Stary*, (Fla. 1955) 84 So.2d 34; *Romano* v. *Palazzo*, 83 Fla. 243, 91 So. 115. The procedure for making a proffer is specified in Florida Rule of Civil Procedure, 1.37(b):

> **"Record of Excluded Evidence.** In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged."

This rule merely requires the "examining attorney [to] make a specific offer of what he expects to prove." Pursuant to this Rule, counsel for petitioner proffered the testimony of the first trial as what he expected to prove. The trial judge then held the proffer was in proper form but that the evidence was inadmissible because it created no justiciable issue under the FELA (R. 360).

Respondents' reliance on F.S. 92.22[1] is misplaced. This statute deals with the use of former testimony "*as evidence* upon any subsequent trial or hearing". In the present case, the former testimony was not used "as evidence". It was merely used to document a proffer of excluded evidence as required under Florida practice.

2. This Court Should Reverse the Judgment Below

Respondents' position in this Court bears but scant resemblance to that which it successfully argued below. In the Florida courts, respondents contended that no matter what the evidence or what motives were involved, their right to give the field test could not be questioned in an FELA action. This position was stated as follows:

---

1. 1 Fla. Stat. 1959, p. 353, Sec. 92.22. This statute provides:

"92.22 *Use of former bills of exceptions as evidence; use of evidence given on former trial.*—In the event it be made to appear to the satisfaction of the court that any evidence used at a trial of a civil case, whether oral or written, and incorporated in a bill of exceptions, or incorporated in the record proper can not be had, then the bill of exceptions taken at the trial, or the evidence incorporated in the record of the trial, may be used as evidence upon any subsequent trial or hearing of the case, or in any other civil cause or civil proceeding, as to any matter in issue at a previous trial or hearing; and, further, in the event that such evidence is not so preserved as before stated, then the same may be used at a subsequent trial or hearing, or in any other civil cause or civil proceeding involving substantially the same issue; if (1) such evidence has at such former trial been reported stenographically or reduced to writing in the presence of the court; (2) that the party against whom the evidence is offered, or his privy, was a party on the former trial; (3) that the issue is substantially the same in both cases; (4) that a substantial reason is shown why the original witness or document is not produced; and, (5) that the court is satisfied that the report of such evidence taken at such former trial is a correct report."

"Mr. Frates [Counsel for petitioner]: Your Honor, one of the contentions here is that this was not an authorized test. This was something that was specifically pointed out for Bert Smith and that, as we told the jury, it was a spite test in an effort to get rid of him.

Mr. Sullivan [Counsel for respondents]: Your Honor, if Mr. Frates is trying a labor case he's in the wrong court.

Mr. Frates: I'm not trying a labor case.

Mr. Sullivan: That's what this seems to come down to.

Mr. Frates: No, it doesn't, your Honor.

Mr. Sullivan: That's what all these remarks all morning have been directed to. That isn't the theory of the case.

Mr. Frates: The theory is that they had no right to take him out there and when they do a wrongful act—

Mr. Sullivan: We better get in a court that has jurisdiction of a labor case." (R. 66).

* * *

"Mr. Sullivan: Your Honor, at the same time I'd like to make at this time a motion to dismiss all the allegations of the Complaint that pertain to the right to give a field test or the circumstances under which it was given, on the grounds that the Court lacks jurisdiction over that; that that's simply a labor matter covered by a separate statute.

It is not a common-law or Federal Employers Liability Act case. It is not incorporated within the scope of such a case, and it is under this federal statute.

In addition, we'd like to move the Court to strike all the testimony about the actual test and the circumstances under which it was given; that is, where Mr. Bert Smith was made to walk, and his testimony and the testimony of other witnesses concerning the condition of the right of way that day.

> We'd like to move to strike all the other testimony pertaining to whether or not they're entitled to give a test like this, whether or not such test has ever been given before. We feel it isn't a matter for this Court. It's a labor matter covered by federal statute." (R. 187-188).

The trial judge rejected respondents' argument (R. 189) and was reversed on appeal for doing so. The Florida appellate court squarely held that:

> "* * * There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U.S.C.A., §151 et seq. Consequently we do not consider that items 1 and 2 under the charge of negligence, supra, constituted triable issues . . ." 104 So.2d at 869-870.

The Florida appellate court went out of its way to point out that it was not attempting to weigh the evidence in an FELA case, stating:

> "An appellate court is always reluctant to reverse a judgment based on a jury verdict for in doing so, it of necessity must sit in judgment of the facts which appear in a cold typed record without the benefit of observing the demeanor and conduct of the witnesses on the stand. However, it is another matter to reverse a cause for new trial when the record of that trial clearly shows that the cause was tried on immaterial issues serving to implant in the minds of a jury prejudice or bias against one of the parties . . ." 104 So.2d 870.

Respondents have completely shifted gears in this Court. They now tacitly admit that petitioner's claim is legally sound but should be rejected because "clearly

unsupported by the record in this cause. * * *." (Brief of Respondents, p. 14). Our reading of respondents' brief discloses no assertion that railroads can devise "field tests" to force retirement. Instead, respondents limit themselves to a factual argument that this is a simple case where an employee was injured while willingly performing a routine field test to determine his physical fitness as a flagman.

Respondents' entire brief is based on the unexpressed major premise that this Court can and should resolve factual questions which were neither raised nor considered below. This premise is doubtful at best. Compare *Northern P. R. Co.* v. *Concannon*, 239 U.S. 382. Be that as it may, respondents' factual assertions are as erroneous as the legal theory which prevailed below. Respondents have wholly failed to state the record in the required light when the issue is whether a plaintiff's FELA jury verdict should be set aside. Cf., *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500.

Petitioner Did Not Voluntarily Take the Test

Respondents' intimation that petitioner consented to and willingly took the field test is contrary to the uncontradicted record. Petitioner was admittedly told to take the test or retire (R. 33-34); and, through his union representatives, filed a formal protest against the test (R. 36-40). Respondents' Trainmaster, C. T. Clark, ordered the test and testified as follows:

> "Q. But, actually, you ordered him there as his superior, didn't you? You sent him a letter and told him to report out there.
>
> A. That's correct.
>
> Q. This is something he didn't do under his own volition.

A. That's correct.

Q. Were you given a letter of protest by his representative, and incidentally, you invited him to have a representative there, did you not?

A. Yes, sir . . ." (R. 36).

Normal Procedure for Medical Department to Determine Fitness

The record refutes respondents' claim that petitioner was given a routine test to determine his physical fitness as a flagman. Respondents' Trainmaster urged petitioner to retire and told him he would have to take the test if he did not do so (R. 33-34, 59-60, 152). Until this ultimatum, questions of physical fitness had always been left to the railroad's medical department. A sick employee could not return to work until the medical department gave him a fit for duty slip (R. 25-26, 70); and respondents' supervisors could order a physical examination of any employee whose fitness was questioned (R. 31-32).

Petitioner was declared fit for duty as a flagman by respondents' local doctor in Miami in August of 1956 (R. 27-28). This medical opinion was confirmed by respondents' chief surgeon who examined petitioner on September 10, 1956 (R. 75-77). These facts were known to respondents' Trainmaster who ordered the medically unsupervised "field test" three days later. In this regard, the Trainmaster testified:

"* * * Q. Now, Mr. Clark, isn't and hasn't it been the history of the railroad when a man was unable to perform his duties and going to retire, that it became a medical question if it was for a physical disability? Weren't the doctors called in on all of these cases?

A. Well, yes, and the doctors will always be called in on a physical disability case.

Q. Now, did you at that time tell Bert Smith to go to the chief surgeon for a physical examination?

A. No, I didn't, because just prior to that he had just been given a release to return to work.

Q. He'd been given a release by your chief surgeon that he was able to perform the duties of a flagman?

A. I think it was by Dr. Nash.

Q. One of the members of the staff.

A. Yes.

Q. Of the railroad. Now, before you gave this test did you consult with Dr. Nash or Dr. Lockwood or any of the doctors on your staff, medical staff, and medical department?

A. No, I didn't, because as I say, that just prior to this test they had, it was in their opinion that he was physically able to perform the duties of a trainman. . ." (R. 34).

In stating his supposed reason for refusing to accept the medical department's opinion in petitioner's case, the Trainmaster stated:

"* * * Yes, that is the opinion of the medical department, that he has recovered sufficiently to go to work. Now, however, the doctors do not have the facilities nor the equipment to actually test a man to see whether—and they're not familiar enough with the duties of each employee to know whether or not he could actually perform the duty in which service he is employed." (R. 24).

On the other hand, the railroad's chief surgeon, who had previously found petitioner fit for duty, testified he had been with the railroad since 1930 and had a "fair idea" of the general type of work done by various railroad employees (R. 71). In fact, he had on occasions consulted with respondents' supervisors and had advised that certain prescribed field tests be performed (R. 74). Had respondents' Trainmaster been sincere in his opinion

as to the medical department's ignorance, it would have been a simple matter to inform the doctors of the required duties and have requested that petitioner be tested accordingly.

No Such Test Ever Given Before

The following testimony shows the uniqueness of the actual test petitioner was forced to take:

Dr. Lockwood [Respondents' Chief Surgeon]

"Q. Now, Dr. Lockwood, I'd like to ask you if you will tell the jury, if you know, in your 30 years' experience, where a trainman was ever taken out and made to walk a mile down the track.

A. No, I don't know of such test having been performed before.

Q. To your knowledge, there has never been such a test made?

A. That's right." (R. 74).

C. T. Clark [Respondents' Trainmaster]

"Q. But this is the only time that anybody in the history of the Florida East Coast ever gave this kind of test.

A. To my knowledge.

Q. To your knowledge.

A. Not this kind of test.

Q. This type of test that was given to Bert Smith.

A. That's right." (R. 44).

P. J. Baumberger [General Chairman Brotherhood of Railroad Trainmen]

"Q. Mr. Baumberger, before we go into the actual details of the test, you've been associated in and around the Florida East Coast since 1912?

A. Yes, Sir.

Q. Have you ever heard or are you aware of any tests such as was being conducted, by anybody on the Florida East Coast?

A. No, sir; I have no knowledge of it." (R. 101).

Flagmen Do Not Have to Walk a Mile

Respondents devote the major portion of their brief to the argument that flagmen must walk a mile in emergencies, and that the mile-long field test was a fair test of a flagman's physical requirements. Admittedly, there is no rule specifying that flagmen must go back a mile to protect the rear of the train (R. 45). Petitioner testified, "You don't never have to walk no mile." (R. 153).

The railroad's rule merely provides:

> "When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fusees." (R. 57-58).

Petitioner worked the railroad's run from Miami to Fort Pierce, which is protected in its entirety by an automatic block signal system (R. 18-19). This system is:

> ". . . an electrical device that indicates by lights, which there's three lights on a mast—they indicate green for proceed; yellow for caution; and red for stop. And they're located approximately a mile apart . . ." (R. 19).

Under the block system, the first block-mile behind a train shows a red light; the second block-mile back displays a yellow light; and a following train must stay in the third block back to get a green light (R. 19). Should the light for any reason, fail to burn, "A dark indication

or no indication at all is the most restrictive indication of any signal." (R. 226). In addition, a dark indication causes the block behind to flash yellow which warns an engineer "to reduce his speed immediately and prepare to stop." (R. 255).

The record discloses no set of circumstances where the block signal system could fail to warn of an impending collision. Even assuming some unheard of malfunction did occur, a flagman still does not have to walk a mile to protect the rear of his train. He can drop off a fusee (lighted flare) as his train is slowing down (R. 129, 133). The fusee can be seen a half mile away during the day and for eleven miles at night (R. 107-108). In addition, petitioner testified that if a train were coming, you could flag it down before you could walk back to the preceding block signal (R. 146).

Petitioner Had Always Done His Job Properly

Petitioner was declared physically fit by respondents' medical department and had worked for thirty-six years without a single demerit (R. 29, 135, 142-143, 232-233). A co-employee who knew petitioner well, testified he had checked on petitioner and had noticed no change in his ability to get around—"he got around just about as fast" (R. 130, 128, 111).

Respondents' Version of Facts Rejected by Jury

Respondents' version of the facts was rejected by the jury which awarded petitioner a $30,000.00 verdict. In making this determination, the jury had ample evidence before it that petitioner was physically fit and subjected to an unheard of and unfair "field test" on the worst spot in the whole railroad (R. 247) in an effort to force his retirement.

Assuming *arguendo* that petitioner was having physical difficulties, the jury still could have found for petitioner on the theory that respondents were negligent in requiring a sick employee to walk a mile. Cf. *Nuttall* v. *Reading Company*, (3rd Cir., 1956) 235 F.2d 546; *Dunn* v. *Conemaugh & Black Lick Railroad*, (3rd Cir., 1959) 267 F.2d 571. Respondents are in error in claiming that petitioner abandoned this theory below (Brief of Respondents, pp. 6-7, 17). The trial judge held this theory was covered by the allegations held improper on the first appeal and that petitioner could not raise the issue on the second trial (R. 333-335, 350). The only reason the amendment (expressly stating the forced-to-work-while-sick theory) was abandoned on appeal was that it was covered by the original allegations which remained in the case. The trial judge had held the theory covered by the general allegations that respondents were at fault in "negligently and unlawfully requiring plaintiff to participate in such a 'field test'." (R. 2).

CONCLUSION

It is again respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 313.

BERT SMITH,
Petitioner;

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III, As Trustees of the Property of Florida East Coast Railway Company, a Florida Corporation,
Respondents.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioner respectfully moves this Court for a rehearing in the above styled cause on the following grounds:

1. By the apparently insignificant and obscure opinion of the majority, a course of judicial administration of many years standing has been renounced by the Court. The lone advocate for a policy of dismissing writs of certiorari, previously granted, on the ground that they were "improvidently granted" (352 U.S. 526) has succeeded in obtaining a majority vote although eight members of the 1956 Court held that such a view could not be reconciled with

the Court's obligation to Congress under the "rule of four." (352 U.S. 559). Regardless of the personal views of individual members of the Court as to whether the Court should assume jurisdiction of FELA cases which involve the sufficiency of the evidence, once jurisdiction has been assumed, the Court owes the parties involved the duty to dispose of the case ". . . on the premise that it is properly here . . ." (352 U.S. 559). If the "rule of four" has been renounced by the Court, this fact should be announced to the Bar so as to preclude further attempts to obtain a review by this Court in similar cases.

2. In its attempt to reconcile the "improvidently granted" rule with the "rule of four", the Court has apparently adopted the common ground expressed by Associate Justice Harlan as the exception to the "rule of four" in 352 U.S. 559, wherein the exception is stated as follows:

> ". . . in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted."

Without taking issue with the validity of the exception, petitioner would respectfully point out that it has no application in the instant case. The question presented in the Petition for Certiorari leaves no doubt to the reader that this Court was asked to review certain facts to determine if they constituted acts of negligence under the Federal Employer's Liability Act. Despite the apparent misinterpretation of a majority of the Court, at least four members of the Court recognized the issue presented in the Petition, and subsequently passed upon the sufficiency of the evidence. If the "rule of four" has any validity, the Court should be obligated to review this case on the merits.

3. The effect of the Court's refusal to assume jurisdiction after previously announcing its decision to do so,

is the deprivation of a jury award to an injured employee of the railroad. This deprivation was created by a state court's confusion in interpreting two federal statutes. Unless this Court grants a rehearing herein and clarifies the issues, the state court's decision, that the Railway Labor Act can preclude a personal injury award under the Federal Employer's Liability Act, will stand for all time as an erroneous pronouncement of law which, to all outward intents and purposes, has this Court's stamp of approval.

Respectfully submitted,

WILLIAM S. FRATES,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I, WILLIAM S. FRATES do hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for delay.

WILLIAM S. FRATES,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 313.—October Term, 1960.

Bert Smith, Petitioner, *v.* J. Turner Butler, et al., Trustees.	On Writ of Certiorari to the District Court of Florida, Third Appellate District.

[April 24, 1961.]

Per Curiam.

The petition for certiorari in this case raised solely a question regarding the bearing of the Railway Labor Act on the enforcement of the Federal Employers' Liability Act. The petition was granted. 364 U. S. 869. After full argument and due consideration, it became manifest that the course of litigation and the decisions in the Florida courts did not turn on the issue on the basis of which certiorari was granted. Accordingly, the writ is dismissed.

SUPREME COURT OF THE UNITED STATES

No. 313.—October Term, 1960.

Bert Smith, Petitioner, *v.* J. Turner Butler, et al., Trustees.	On Writ of Certiorari to the District Court of Florida, Third Appellate District.

[April 24, 1961.]

Mr. Justice Brennan, with whom The Chief Justice and Mr. Justice Black join, dissenting.

I cannot agree that, as the Court says, the petition for certiorari in this case "raised solely a question regarding the bearing of the Railway Labor Act on the enforcement of the Federal Employers' Liability Act." The issue actually tendered is the familiar one whether a reviewing court properly deprived an FELA claimant of a jury verdict on the ground that the evidence was insufficient to support the finding of the carrier's negligence. The Court relies upon "the course of litigation and the decisions in the Florida courts." My reading of what occurred in the Florida courts makes manifest to me that the issue under the Question Presented in the petition is as to the sufficiency of the proofs to establish negligence.

The petitioner was a flagman in the employ of Florida East Coast Railway. He brought this action under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, in the Circuit Court of Dade County, Florida. He alleged that he suffered injuries in the course of his employment while taking a "field test" which the carrier required him to take along its right of way and tracks in Florida. He alleged eight grounds of negligence but has abandoned six and we are concerned only with two, namely that the carrier violated the Federal Employers' Liability Act, "(a) in negligently and unlawfully requir-

ing the plaintiff to participate in such a 'field test'; (2) in negligently allowing its servants, agents or supervisors to conduct such a 'field test.'" At the close of petitioner's case at the trial, the carrier made a motion to dismiss the claim alleged under allegations (a) and (b), on the ground that those allegations "pertain to the right to give a field test." Respondents contended, that such a claim, if cognizable at all, was cognizable not under the Federal Employers' Liability Act but only as a grievance within the exclusive cognizance of the National Railroad Adjustment Board created under the Railway Labor Act, 45 U. S. C. § 153, First (i); see *Union Pacific R. Co.* v. *Price*, 360 U. S. 601. The trial judge denied the motion and ruled that the gravamen of the petitioner's claim was not that respondents could not require petitioner to take a test, but that "knowing his physical condition," the carrier was negligent in requiring the petitioner to take the particular test. The trial judge also denied the carrier's motion for a directed verdict grounded on the alleged insufficiency of the proofs to establish negligence. The jury returned a verdict for the petitioner. The Florida District Court of Appeal, Third District, reversed and remanded the case for a new trial. 104 So. 2d 868.

On remand counsel for both parties and the trial judge discussed at length what it was the Court of Appeal held. There was agreement that the opinion of the Court of Appeal was ambiguous. It might be read to ground the reversal on the finding by the Court of Appeal that the cause was pleaded and tried on a claim not actionable under the Federal Employers' Liability Act but, if at all, under the Railway Labor Act. This is suggested by the language in the opinion, "If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act." 104 So. 2d —. On the other hand the opinion might also be interpreted as grounding the reversal on the insufficiency of the evidence to prove

negligence, because the petitioner, while assuming the right of the carrier to give the test, had failed to show that it was negligent in the circumstances proved for the carrier to require the petitioner to take the test. Support for this interpretation is in the statement of the opinion that "the appellee's entire case as reflected by this record conclusively indicates that it was premised upon the claim that appellant's conduct in requiring the appellee to take a field test was unlawful and that all of his injuries and damages resulted from such unlawful act." 104 So. 2d —.

The trial judge finally concluded that the opinion of the Court of Appeal was to be read as resting the reversal upon the latter ground. The trial judge stated, "I think that I am inclined to agree with [petitioner's counsel] that they [the Court of Appeal] just didn't say requiring a field test was improper. They said 'requiring the appellee to participate in a field test,' and they had the field test that was conducted when they wrote this opinion, and if their opinion means anything to us at all, I think we have got to follow it to the extent of our interpretation of their words and what they meant." The trial judge ruled further that a cause of action for negligence on the part of the carrier in giving the particular test "would be included" in allegation (a) above quoted.

The record on remand thus plainly reveals that the trial judge agreed with petitioner's argument that allegations (a) and (b) of the complaint pleaded, and the parties had tried, a cause of action under the Federal Employers' Liability Act.

Counsel for the carrier admitted during the colloquy on the remand that if this was the cause of action pleaded and tried, the claim was actionable under the Federal Employers' Liability Act. Carrier's counsel went further. He said, "I think the proofs so far justify it, but if they want to travel on that issue, I think they could

amend." Petitioner's counsel was willing to amend but insisted that the case had been pleaded and tried on that theory and that no amendment was necessary. No formal amendment was made, obviously because the trial judge ruled that the theory was embraced within allegation (a). However, petitioner's counsel desired to apply for review of the Court of Appeal's determination as rested, as the trial judge had interpreted its opinion, on the ground that the evidence was insufficient to present a jury question of negligence. But, since a new trial was ordered by the Court of Appeal, there could be no final judgment review of which might be sought until a judgment was entered on the retrial. In order to obtain such a judgment without retrying the case, petitioner's counsel proffered the trial record of the the first trial as his only proofs at the retrial. He expressly stated that his position was that the trial record was sufficient "to prove that the railroad either knew, or should have known, that Bert Smith was physically unable to take that test and likely to be injured if he took it, and in spite of what the railroad knew, or should have known, they gave him the test." The trial judge accepted the proffer over the carrier's objection, but ruled that he was bound by the Court of Appeal's holding that that record did not suffice to raise a jury question of negligence. "Under the testimony that was introduced before on this point, that it would rule that there was no proper issue of evidence to submit to the jury of negligence on requiring him to take this particular field test under the testimony." The judge accordingly directed the entry of a judgment in favor of the carrier. Obviously the case went to the District Court of Appeal the second time with this gloss of the trial judge's interpretation of that Court's earlier opinion. Therefore, when the District Court of Appeal, *per curiam*, affirmed "upon the authority" of its previous opinion, 118 So. 2d 237, the affirmance sustained the trial judge's inter-

pretation of the reversal as having rested, not on the ground that the Railway Labor Act precluded the petitioner's claim under the Federal Employers' Liability Act, but on the ground that the evidence of negligence was insufficient to support a recovery on the claim properly pleaded under the latter statute. The Supreme Court of Florida, in an unreported minute, denied petitioner's petition for certiorari. We granted his petition to this Court, 364 U. S. 869.

Against this background of "the course of litigation and the decisions in the Florida courts" the Question Presented, if plain English is to have its ordinary meaning, is whether the Florida Court of Appeal correctly determined that the evidence at the first trial was insufficient to raise a jury question of the alleged negligence of the carrier in requiring the petitioner, knowing his physical condition, to take the field test. For the Question Presented is as follows:

> "Did the Florida Appellate Court err in holding that when a railroad employee sustains personal injuries while performing an alleged physical fitness field test ordered by the railroad that the provisions of the Railway Labor Act, 45 U. S. C., Section 151, *et seq.*, preclude him from claiming *that the giving of such a test under the facts and circumstances of this case was an act of negligence under the Federal Employers' Liability Act*, 45 U. S. C., Section 51, et seq.?" (Emphasis supplied.)

Although the members of the Court have disagreed whether we should grant review of these cases, when they are brought here all of us except my Brother FRANKFURTER believe that we have the duty to decide them on the merits. Viewing the issue presented for our review I have read the trial record. I need not rely solely on my own conclusion that the evidence plainly presented

a jury question "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought." *Rogers* v. *Missouri-Pacific R. Co.*, 352 U. S. 500, 506. I may summon to my support the concession of the carrier's counsel that on that issue "the proofs so far justify it." I would reverse and remand the cause with direction to enter an order reinstating the judgment in favor of the petitioner.

MR. JUSTICE DOUGLAS joins this opinion except that he would remand for a new trial. He believes that the District Court of Appeal was correct in holding that the jury trial was not a fair one. See *Butler* v. *Smith*, 104 So. 2d 868.